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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SARAH LINDA PARKER, *et al.*,
Petitioners,

vs.

JUDITH K. ANDERSON, and
BELL HELICOPTER COMPANY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In pursuing a Title VII class action settlement, do class attorneys who simultaneously negotiate both the terms of class relief and payment of their own attorney's fees by creating one settlement fund to compensate both the class and themselves thereby engage in an unlawful and impermissible conflict of interest.

2. In pursuing a Title VII class action settlement, do class attorneys who fail to advise the class representatives of the terms being negotiated in settlement, who fail to permit the representatives any opportunity to propose the terms of relief most desired by and of most benefit to the class, who fail to properly assist the representatives in evaluating the need for or the merits and effect of the settlement, who fraudulently include a damaging provision in the final settlement without notice to and discussion with the representatives, who formally sign and approve the settlement without notice to the representatives, and who misrepresent and conceal the representatives' enormous opposition to the settlement at the time it is filed with the district court, thereby violate the duty to provide "fair and adequate representation" to members of the class, as required by Fed.R.Civ.P. 23 (a) (4).

PARTIES

The following is a listing of all parties to the proceedings in the Court of Appeals, as required by Supreme Court Rule 21.1 (b):

1. Petitioners Sarah Linda Parker, Blanche W. Eberly, Curtis Ford, Peggy N. Haynes, Mary T. Jackson, Ernest Mackey, Albert Odum, Opal W. Randall, Nathaniel Rodgers and Dorothy Spears.

2. The Class:

> All Blacks, male and female, who were employed or who applied for employment at any Texas facility of Bell Helicopter Company at any time between November 26, 1972 and March 1, 1980; and
>
> All other Females, who were employed or who applied for employment at any Texas facility of Bell Helicopter Company at any time between November 2, 1973 and March 1, 1980.

3. Respondent Judith K. Anderson.

4. Respondent Bell Helicopter Company, a division of Textron, Inc.

5. Huey P.Mitchell, associate class attorney (an Appellant in the Court of Appeals.

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IN THE

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OCTOBER TERM, 1981

SARAH LINDA PARKER, *et al.*,[1]
Petitioners

vs.

JUDITH K. ANDERSON,[2] and
BELL HELICOPTER COMPANY, *et al.*,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Sarah Linda Parker, et al., pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered on February 18, 1982.

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[1]Petitioners Sarah Linda Parker, et al., comprise ten of the original eleven individuals appointed to represent the class in this cause. These ten individuals disapproved the class settlement filed in this case, and herein represent all persons in the class who oppose such settlement.

[2]Respondent Judith K. Anderson is the remaining individual originally appointed to represent the class. She approved the settlement, and herein represents only those persons in the class who approve the settlement.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is officially reported at 667 F.2d 1204, and appears herein as Appendix A. The original opinion rendered by the District Court for the Northern District of Texas, Fort Worth Division, which is unreported, is reproduced herein as Appendix B. The District Court's order amending its original opinion, which is also unreported, is reproduced herein as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Fed.R.Civ.P. 23(a) (4), 28 U.S.C.:

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if ... (4) the representative parties will fairly and adequately protect the interests of the class.

STATEMENT OF THE CASE

A. Proceedings Below:

On March 5, 1975, Petitioners Sarah Linda Parker and Curtis Ford filed a class action suit against Bell Helicopter Company, a division of Textron, Inc., and certain unions, alleging discrimination in employment against blacks and females, in violation of Title

VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. 1981. Between 1975 and 1979, six other lawsuits were brought alleging identical discrimination by Bell Helicopter Co. These seven suits were eventually consolidated into the instant proceeding.[3]

Following consolidation, dissension arose among the class attorneys regarding who would assume the duties of lead class counsel, and therefore be entitled to the lion's portion of any fee award. Since no agreement was reached, the district court appoined Howard Spencer as lead counsel and Huey Mitchell and James Barber as associate class counsel, assigning them duties concommitant with such positions. On April 21, 1978, the district court conditionally certified the litigation as a class action under Rule 23 (b) (2) of the Federal Rules of Civil Proceedure. Extensive, reciprocal discovery on the merits began in October 1978 and continued until February 1980. Time records of Plaintiffs' attorneys indicate that discovery on behalf of the class was conducted almost exclusively by Mr. Specter's law firm.

Trial was scheduled for March 3, 1980. On February 29, 1980, negotiations between Mr. Specter and counsel for Bell Helicopter concluded in their reaching a comprehensive settlement agreement. On the basis of this agreement, a joint motion for continuance was submitted to the district court. The district court granted this motion, instructing counsel to advise the court on or before April 1, 1980 whether the agreement could be completed.

On March 28, 1980, Mr. Specter and other class counsel formally signed and approved a "Proposed Stipulation of Compromise and Settlement" (hereafter, "Proposed Settlement"). In general terms, the Proposed Settlement provided for the resolution of all claims held by members of the absentee class. However, the

[3]Subsequently, the claims against the unions were severed, and at this time are pending in the district court.

Proposed Settlement also severed all of the individual claims of Ms. Parker and the other class representatives, which claims are still pending before the district court.

On October 16-18, 1980, the district court conducted a settlement hearing on matters relating to the nature of the settlement negotiations, the adequacy of the Proposed Settlement and the amount of attorney's fees. On March 10, 1981, the district court issued a Memorandum Opinion and Order awarding fees to class counsel and approving the Proposed Settlement. Judgment was initially entered on March 31, 1981, but was later withdrawn in order that the district court could amend its original opinion to increase the award of attorney's fees and correct clerical mistakes. A final judgement was thereafter entered on April 10, 1981.

On May 8, 1981, Petitioners filed Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals heard oral argument on August 24, 1981, and on February 18, 1982 rendered an opinion affirming the judgement of the district court.[4]

B. Statement of Facts:

On the eve of trial, Mr. Specter and attorneys for Bell Helicopter began negotiations which led to the settlement agreement of February 29, 1980. This agreement was sufficiently explicit and comprehensive that only certain details remained in order to implement and incorporate it into a final settlement document. Mr. Specter was the only class attorney who participated in negotiating the settlement.

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[4]Huey Mitchell also filed an appeal alleging the district court failed to award him sufficient attorney's fees. The Court of Appeals upheld the district court's award. Thereafter Mr. Mitchell filed a suggestion for rehearing en banc, which was denied on March 15, 1982.

This settlement agreement was negotiated by Mr. Specter without consulting any of the class representatives. He did not advise the representatives that settlement was being contemplated. He did not advise any representative of the terms being negotiated before the agreement was reached. No class representative had any input into the settlement, and Mr. Specter did not give the representatives any opportunity to propose the terms of relief which were of most priority or benefit to the class. After February 29, 1980, the terms of this settlement were released to the representatives through their respective class attorneys.[5]

Since the other associate class counsel had not conducted and analyzed the voluminous discovery obtained in this case nor participated in any of the settlement negotiations, the class representatives waited for Mr. Specter to call a meeting to discuss the settlement. When no communication was forthcoming from Mr. Specter, the representatives themselves called a meeting for March 26, 1980.

At this meeting, one of the representatives brought a letter he had just received from Mr. Specter. In this letter, Mr. Specter attempted to justify the settlement solely on the basis of the Defendant's statistics, together with his bare conclusion that the class had a weak case. After reviewing and discussing the terms of settlement and the meager evaluation presented in Mr. Specter's letter, the representatives voted unanimously to reject the settlement agreement as providing inadequate relief to members of the class. This message was conveyed to one of the associate class attorneys who came late to the meeting.

Two days later, on March 28, 1980, without any notice or warning to the representatives, Mr. Specter and the other class counsel

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[5]Mr. Specter and local counsel Wallace Craig originally represented Plaintiffs Ernest Mackey and Albert Odom. Attorney James Barber originally represented Plaintiff Dorothy Spears. The remaining eight Plaintiffs were represented by Huey Mitchell.

formally signed and approved the Proposed Settlement. However, before doing so, Mr. Specter also agreed to the inclusion of a major, additional settlement provision. This additional term critically impaired the effectiveness of all affirmative relief contained in the settlement. By such provision, the Defendant's obligation to provide class-wide affirmative relief was limited to a period of only four years. Mr. Specter made no attempt even to contact the representatives before including this devastating term in the settlement.

After Mr. Specter had formally signed and approved the Proposed Settlement, the representatives also learned for the first time that he had simultaneously negotiated matters involving class relief and payment of his own attorney's fees, and that he had created a conflict of interest by establishing one settlement fund to compensate both the class and the class attorneys.

Only after the Proposed Settlement was formally approved did Mr. Specter consent to meet with the representatives. At this meeting on April 8, 1980, the representatives again voiced their opposition to the settlement because of the inadequate relief provided to the class. They also openly expressed their anger with Mr. Specter's shabby and suspicious representation of the class during the settlement. Mr. Specter now offered to meet with the representatives individually. However, since the settlement was already signed and sealed, the representatives rejected this belated and sanctimonious show of generosity.

On April 18, 1980, Mr. Specter filed the Proposed Settlement. At this time, Mr. Specter also misrepresented to the district court that all of the representatives approved the agreement, despite Mr. Specter's obvious knowledge of their strong opposition just ten days before. Thereafter, the district court granted the motions of ten of the eleven class representatives dismissing Mr. Specter and the other associate counsel as class attorneys.

REASONS FOR THE WRIT

I.

The Petition Raises Substantial and Vital Issues Concerning The Prevention of Actual And Potential Abuse Of The Class Action Device

As negotiated by Mr. Specter, the Proposed Settlement creates one fund of money serving two purposes: To compensate the class and to pay attorney's fees. By such action, Mr. Specter and other class counsel have acquired a substantial, pecuniary interest in the monetary benefits established to reimburse the class. Such conflict of interest specifically violates the American Bar Association Code of Professional Responsibility. As provided by the ABA Code in Disciplinary Rule 5-103(A): "[A]n attorney shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client."

The evil that festers in such situations is two fold: First, by such procedure, class attorneys are given the incentive to negotiate a settlement fund large enough to pay their own attorney's fees, without the further incentive to assure that the remainder of the settlement fund is adequate to protect the class. With permission to acquire a proprietary interest in the settlement fund, the class attorneys will not so zealously assure that the level of the fund, beyond the amount necessary to pay their fees, is sufficient to compensate the class. Class attorneys often expend substantial time and incur great expense in the development of class litigation.[6] Facing the greater need to protect this immense investment of time and money, class attorneys must not be given the incentive to secure their own financial rewards at the expense of the class.

[6]*See*, Newburg, *Newburg on Class Actions*, (Supp. 1982), pp. 756-788, pp. CS13-47 - CS13-57 (references are to pages within the Supplement).

Secondly, once having negotiated a single fund to compensate the class and to pay attorney's fees, a class attorney can no longer be fully relied on to provide the most ardent and loyal assistance in evaluating the adequacy of the settlement. Once the class attorney has acquired this conflicting, pecuniary interest, neither the class nor the court can be confident of the attorney's continued honest and unbiased judgment when asked to appraise whether the settlement protects the interests of the class.

In passing on this issue, the Court of Appeals radically departs from the entire body of case law on the subject.[7] The Fifth Circuit holds that when the trial judge complies with the applicable procedures for determining the reasonableness of attorney's fees, any review of matters involving an attorney's conduct is limited to whether the trial court abused its discretion in determining the amount of the fee.

It is the Fifth Circuit's conclusion that if the trial court is careful in determining that the *amount* of attorney's fees is reasonable, then such procedure automatically assures that the *manner* by which such fees were negotiated is also reasonable. The Fifth Circuit assumes that if a trial judge protects the class by prudently determining the amount of attorney's fees, he has then *a priori* protected the class from any improper manner by which the fees were negotiated.

The fallacy in this reasoning is self-evident. The most scrupulous review of the amount of attorney's fees will never assure that the manner by which the fees were negotiated will protect the integrity of the settlement process. Insuring the reasonableness of the amount of attorney's fees will never guarantee that a class attorney has ardently and conscientiously bargained for the most adequate compensation for the class once he was certain the settlement fund was large enough to pay his own attorney's fees.

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[7]See pages 9-12, *infra*.

Further, one could never be sure that a class attorney later submitted a modest request for attorney's fees in order to avoid any examination of the earlier manner by which he had negotiated the settlement.

By focussing solely on the amount of the attorney's fees, the Fifth Circuit also fails to curb the other evil inherent in the practice of creating one fund to pay both the class and the class attorneys. That is once an attorney becomes dependent upon the settlement fund for payment of his fees, neither the class nor the court can be certain of his unswerving devotion, trustworthiness and honest judgment when asked to evaluate the adequacy of the settlement.

Both the class and the court rely heavily on the opinion of class counsel regarding this matter.[8] However, a mere finding that the amount of attorney's fees is reasonable will have no power to deter the evil of attorneys giving misleading advice regarding the adequacy of the class relief, in order to assure recovery of their own fees.

Thus, negotiating one settlement fund to pay both the class and the class attorneys creates a clear conflict of interest which destroys the fragile barrier confining the well known potential for abuse inherent in the class action settlement process.

II.

There Exists An Irreconcilable Conflict In The Courts of Appeal

Until now it has always been held that a serious, substantial and impermissible conflict of interest occurs when a class attorney negotiates a settlement in which his fees will be payed from the

[8] *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

same fund created to compensate his class. The Courts of Appeals in both the Third and Ninth Circuits have specifically disapproved this practice.

In *Prandini v. National Tea Co.*, 557 F.2d 1015, (3rd Cir. 1977), the Court of Appeals for the Third Circuit was presented with this exact situation in which class attorneys had negotiated a settlement creating one fund to pay both the class and themselves. Addressing the abuse inherent in this arrangement, the Third Circuit specifically required that:

> [T]rial courts insist upon settlement of the damages aspect of the case separately from the award of attorney's fees. *Only after* Court approval of the damages settlement should discussion and negotiation of appropriate compensation for attorneys begin. This would eliminate the situation in this case of having, in practical effect, one fund divided between the attorney and client. 557 F.2d at 1021. (Emphasis added).

Similarly, in *Mendoza v. United States*, 623 F.2d 1338 (9th Cir. 1980, *cert. denied*, 450 U.S. 912 (1980), the Ninth Circuit strongly discouraged the simultaneous negotiation of attorney's fees and substantive class relief. In this case, the Ninth Circuit carved out an exception to the rule prohibiting such simultaneous negotiation. Under this exception, where a disinterested governmental agency participates in the settlement negotations and oversees the interests of the class, the abuse inherent in such simultaneous negotiation of attorney's fees and class relief will be neutralized and the settlement will be upheld.

In *Mendoza*, the United States Department of Justice supervised the settlement negotiations. However, in the instant case, no such governmental agency or any other disinterested third party was present to neutralize the abuse and unethical conduct preci-

pitated by Mr. Specter's simultaneously negotiating one settlement fund to pay both the class and the class attorneys.

Of further importance is that prior to this case, the district courts which have addressed the issue of the simultaneous creation of one settlement fund to pay both the class and the class attorneys, have uniformly disapproved such conduct.[9]

Contrary to decisions of the Third and Ninth Circuits, the Fifth Circuit has established a sweeping new principle which radically departs from the uniform rule precluding class attorneys from creating one settlement fund to pay both themselves and members of the class.

As previously described, the Fifth Circuit's decision permits a class attorney to engage in a conflict of interest which critically impairs his ability to adequately protect the interests of the class. By deciding that the reasonableness of the attorney's fee award legitimates any abuse and unethical conduct in the manner by which such fees were negotiated, the Fifth Circuit simply holds that the end justifies the means. By this decision, the Fifth Circuit writes Due Process out of the law.

As indicated in *Prandini, supra,* in order to avoid any conflict of interest, discussion and negotiation of attorney's fees is most appropriately reserved until *after* court approval of the class settlement. Such arrangement guarantees the continued health of Due Process and insures that class attorneys will devote their best

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[9]*Regaldo v. Johnson*, 79 F.R.D. 44 (E.D.Ill. 1978); *Jamison v. Butcher & Sherrard*, 68 F.R.D. 479 (E.D.Pa. 1975); *Munoz v. Arizona State University*, 80 F.R.D. 670 (D. Ariz. 1978); *Lyon v. State of Arizona*, 80 F.R.D. 665 (D.Ariz. 1978); *Norman v. McKee*, 290 F.Supp. 29 N.D.Cal. 1968), *aff'd on other grounds*, 431 F.2d 769 (9th Cir. 1970).

See also, Manual for Complex Litigation, reprinted in 1(Pt.2) J. Moore, *Federal Practice, Manual for Complex Litigation*, Pt. II, §1.46 (1979): "[W]hen counsel for the class negotiates simultaneously for the settlement fund and for individual counsel fees there is an inherent conflict of interest."

efforts to adequately protecting the interests of the class without succumbing to the obvious potential for abuse in settling such litigation.

III.

The Court of Appeals' Decision Will Cause The Severe and Immediate Erosion In Standards Of Professional Comptence And Responsibility Of Class Attorneys.

"[A] broad consensus has now emerged that a significant problem concerning the quality of a substantial number of lawyer's performances in the trial courts does indeed exist."[10] One can "accept as a working hypothesis that from one-third to one-half of the lawyers who appear in serious cases are not really qualified to render adequate representation."[11]

In class actions, the concept of "adequate representation" is of fundamental importance. This Court has consistently held that where the interests of the absentee parties are not protected during class litigation, the requirements of Due Process will not be satisfied. *Handsberry v. Lee,* 311 U.S. 32 (1940); *Sam Fox Publishing Co. v. United States,* 366 U.S. 683 (1961). This concept has been embodied in Fed.R.Civ.P. 23(a) (4) which requires that "[t]he representative parties will fairly and adequately protect the interests of the class." Thus, in the context of class litigation, "adequate representation" is the touchstone of Due Process.

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[10]Warren E. Burger, *Some Reflections on the Problems of Adequacy of Trial Counsel*, 49 Fordham L. Rev. 1 (1980).

[11]Warren E. Burger, *The Special Skills of Advocacy*, 42 Fordham L. Rev. 227, 234 (1973).

In such litigation, "experience teaches that it is class counsel and not the named parties who direct and manage the litigation." *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3rd Cir. 1973). It is widely acknowledged that the actions of class counsel must be continually scrutinized in all phases of the litigation, including the settlement stage, to ensure that the rights of absentee class members are not abused.[12]

The dangers of attorneys abusing the class action device are well known. As this Court recently observed in *Deposit Guarantee National Bank v. Roper*, 445 U.S. 326, 339 (1980):

> [The] potential for misuse of the class action mechanism is obvious. Its benefits to the class members are often nominal and symbolic with persons other than class members becoming the chief beneficiaries.

At the settlement stage, the potential for abuse by class attorneys is omnipresent. At this stage, there is always the temptation for class attorneys to recommend settlement on terms less favorable to their clients because a large fee is part of the bargain.[13] For such reasons, class attorneys are held to higher standards of professional competence and responsibility, since they serve in a position of "public trust" with fiduciary obligations to those not before the court.[14]

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[12] *In re General Motors Corp. Interchange Litigation*, 594 F.2d 1106, 1124 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979); *North American Acceptance Corp. Securities v. Arnall, Golden & Gregory*, 593 F.2d 642, 645 (5th Cir. 1979), *cert. denied*, 444 U.S. 956 (1979).

[13] *Developments in the Law - Class Actions*, 89 Harv. L. Rev. 1318, 1552 (1976); *Graybeal v. American Savings & Loan Ass'n.*, 59 F.R.D. 7.13 (D.D.C. 1973).

[14] *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973), *cert. denied*, 414 U.S. 1092 (1973); *Greenfield v. Villager Industries, supra*, 483 F.2d 824, 832 (3rd Cir. 1973).

To outline the nature and quality of Mr. Specter's representation during the settlement of the instant case, first he totally failed to advise the class representatives of the terms being discussed in settlement of the litigation. Second, he failed to notify any of the representatives that settlement was even being discussed until just before reaching agreement with the Defendant. Third, he reached a settlement agreement with the Defendant without permitting the representatives any chance to recommend the relief which was of highest priority and most benefit to the class. Fourth, he failed to properly assist the representatives in evaluating the reasons for settlement or the merits and effect of the terms of relief. Fifth, he then fraudulently concealed his agreement to include a new and critical provision in the final settlement document. Sixth, without notice to the representatives he formally approved the settlement over their objections. Finally, he misrepresented to and concealed from the district court the overwhelming opposition to the settlement at the time it was filed.[15]

In the instant case, before the February 29, 1980 settlement agreement was reached, Mr. Specter wholly failed to advise the representatives of the terms being negotiated on behalf of the class. Such conduct is alone a breach of ethics and a violation of the fiduciary duties owed to the class.[16] Over a century ago, this Court announced that "it is the duty of an attorney to advise the client

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[15]This portrait of Mr. Specter's conduct during the settlement must also include the fact that he caused a conflict of interest in the manner by which he negotiated payment of his attorney's fees, as previously discussed herein.

[16]The violation of an attorney's duty to inform and advise his clients is tortious, *Spector v. Mermelstein*, 316 F.Supp. 30 (S.D.N.Y. 1972), *modified* 485 F.2d 474 (2d Cir. 1973); *Transcontinental Ins. Co. v. Faler*, 513 P.2d 864 (Wash.App. 1973); *Passanante v. Yormark*, 350 A.2d 497 (N.J.Super. A.D. 1975); *Mageary v. Hoyt*, 369 P.2d 662 (Ariz. 1962); and has often been grounds for severe disciplinary action. *In re Estes*, 212 N.W.2d 903 (Mich.1973); *People v. Forsyth*, 543 P.2d 1210 (Colo. 1975); *The Florida State Bar v. Bratton*, 389 So.2d 637 (Fla. 1980); *North Carolina State Bar v. Combs*, 261 S.E.2d 207 (N.Car. 1980).

promptly whenever he has any information to give which the client should receive." *Baker v. Humphrey,* 101 U.S. 494, 499 (1880).

Similarly, at no time before the settlement was approved did Mr. Specter provide the representatives any opportunity to propose the terms of affirmative relief most desired by and of greatest benefit to the class.[17] The importance of such input is undeniable. Unless the relief sought during the settlement can be considered what would be desired by the absentee members of the class, it would be a violation of due process to impose this settlement as a binding judgment against them. *See Hansberry v. Lee, supra,* 311 U.S. at 38-40.

Further, once the February 29, 1980 agreement was reached, Mr. Specter failed to properly assist the class representatives in evaluating the settlement. Mr. Specter totally deprived the representatives of adequate information by which they could determine the reasons for pursuing settlement, appraise the strengths and weaknesses of the case, measure the risks of establishing liability and damages, and gauge the merits and effect of the settlement terms.

Mr. Specter never met with the representatives to assist in evaluating these matters before he formally signed and approved the settlement on March 28, 1980. Instead, he sent one letter addressed to two representatives, in an attempt to justify the settlement. However, the information he provided in the letter was useless as a basis for making an informed and intelligent evaluation.

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[17] Affirmative relief is of particular importance in Title VII class litigation. This Court has repeatedly emphasized that the object of Congress in enacting Title VII was to achieve equal employment opporunities and to eliminate those discriminatory practices which have fostered radically stratified job enfironments to the disadvantage of minorities. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

(continued)

In this letter, the only objective information provided by Mr. Specter as a basis for settlement were certain statistics compiled by the *Defendant.*[18] Mr. Specter made no effort to discuss the nature and strength of *Plaintiffs'* statistical or non-statistical evidence. Thus, the representatives had no basis on which to make an informed and careful judgment regarding the strength of the case and the potential success in establishing liability and damages. Neither did this letter include any information which permitted an

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For example, the following basic and fundamental provisions of affirmative relief are completely missing in the settlement negotiated by Mr. Specter: (1) There are no hiring goals or preferences for Black or Female applicants; (2) There are no promotional goals or job preferences for Black or Female employees; (3) There are no training programs created for minority applicants or employees; (4) There is no requirement that Defendant obtain and implement an independent validation of the selection criteria used as the basis for its hiring and promotional decisions; and (5) There is no requirement that job openings be posted.

Instead, the affirmative relief provisions actually contained in the settlement in thsi case are self-serving (e.g., Defendant acknowledges its commitment to equal employment); presently in existence (e.g., Defendant agrees to retain employment applications for at least one year, when it already does so; Defendant agrees to create the position of Equal Opportunity Counselor, when it already has employees with similar job titles and functions; Defendant agrees to establish a procedure for educating supervisors about equal employment obligations, when it already has such a program in existence); totally unenforceable (e.g., Defendant agrees to employ only "properly trained and qualified" recruiters); or frought with loopholes (e.g., Defendant agrees to maintain a list of certain available positions, but doesn't agree to post the list anywhere or show it to anyone; Defendant agrees to evaluate its supervisors' "contributions" to equal employment, but doesn't agree to take any corrective action if the "contribution" is unsatisfactory; Defendant agrees to require written reasons when a minority is rejected for employment or promotion, but doesn't agree to show the reasons to the affected person or to take any corrective action if the rejection is unlawful). Each of the other few settlement provisions negotiated by Mr. Specter are riddled with the same infirmities.

[18]It perhaps goes without saying that if all plaintiffs were compelled to rely soley on the defendant's view of the evidence when deciding whether a settlement offer was justified, there would hardly be any reason to file suit.

objective appraisal of the merits or effect of the terms of relief.[19]

It can not be emphasized too strongly that "adequate representation" at this stage of the litigation requires class counsel to provide the representatives with basic information about the reasons for settlement and the merits and effect of the terms of class relief.[20] Without adequate assistance and information from their own counsel, laymen can not be expected to protect their rights when dealing with practiced and carefully counselled adversaries. *See, Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1, 8 (1964).

Further, on March 28, 1980, in a shocking and outrageous breach of ethics, Mr. Specter formally agreed to include in the settlement a crucial, new provision without disclosing this term to the

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[19]As further example of the ineffective assistance provided by Mr. Specter, at no time prior to his formally approving the settlement did he ever advise the representatives of the amount of the attorney's fees which were to be deducted from the settlement fund created to compensate the class. Through such neglect and indifference, the representatives were never given the opportunity to determine how much money the class was actually to receive after the class attorneys took their fees off the top of the settlement fund. Thus, the representatives were also deprived by class counsel of any ability even to begin to evaluate the adequacy of the monetary relief provided by the settlement.

Six month later, Mr. Specter and other class counsel finally revealed to the district court the amount of their fee request. Collectively, their petitions amounted to a request for over $704,000. Since the amount in the settlement fund at the time the petitions were submitted was approximately $1,366,000, Mr. Specter and other class counsel were soliciting more than 51% of the settlement fund for themselves. As if this were not enough, Mr. Specter later petitioned for additional fees and expenses in excess of $45,000, to be added to his original request of more than $496,000.

[20]"Unless one is a Title VII Specialist armed with previous experience in drafting and implementing consent decrees, it is very difficult to tell whether any one decree is 'good,' that is, whether it has satisfied to the fullest extent possible Title VII objectives of eradicating employment discrimination and making 'whole' each employee who has suffered discrimination." *Title VII Consent Decrees: Affirmative Inaction?* 18 Santa Clara L. Rev. 517, 518 (1978).

representatives before he signed the settlement agreement. Simply put, this is fraud. Moreover, the result of this new provision was to limit the Defendant's obligation to provide affirmative relief to a period of only four years. Thus, by such unprincipled action, Mr. Specter cut the heart out of any lasting effectiveness the settlement might provide to members of the class.

The Fifth Circuit says that Mr. Specter gave "uncontroverted testimony" that he was not aware of the four year term until the day that he signed the final agreement on March 28, 1980, and thus, his failure to inform the representatives of this new term can not constitute misrepresentation.

Unfortunately, the Fifth Circuit's reasoning is both fallacious and unfounded. The Fifth Circuit is correct in saying that no misrepresentation occurred during the time that Mr. Specter did not know of the new term to be included. Yet, while this is obvious, it begs the question. The fraud committed by Mr. Specter is that once he knew of this critical term, he agreed to include it in the settlement without first notifying and discussing such action with the representatives. Further, it is more remarkable that the Fifth Circuit seek to base this reasoning on the "uncontroverted testimony" of Mr. Specter, since it is a cold, hard fact, readily observable from the briefest inspection of the record that Mr. Specter did not testify, nor was he sworn to testify, at the settlement hearing about anything except attorney's fees.

By engaging in such fraudulent conduct, Mr. Specter not only breached his fiduciary obligations to the class, but also undermined the integrity of the settlement process. The integrity of this process depends upon an attorney's duty to assure that his conduct is of the utmost good faith, consistent with the most scrupulous standards of professionaly competence and responsibility.[21] Per-

[21] *See, Miller v. Republic Nat. Life Ins. Co.*, 559 F.2d 426 (5th Cir. 1977); *Flinn v. FMC Corp., supra*, 528 F.2d at 1173.

mitting such conduct demonstrated by Mr. Specter is unthinkable, and will only serve to reduce the quality of representation in federal courts already believed by many judges to be at a critical level.[22]

However, this was not the only fraudulent act that Mr. Specter committed during the settlement process. Regrettably, on April 18, 1980, Mr. Specter specifically, and in writing, misrepresented to the district court that the Plaintiffs were desirous of compromising the litigation on the terms contained in the settlement.[23] Nothing could have been further from the truth. The Plaintiffs' tremendous opposition was brought home to Mr. Specter only ten days earlier, when on April 8, 1980, they told Mr. Specter in no uncertain terms that as representatives of the class they were opposed to the settlement, just as they had earlier expressed their unanimous opposi-

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[22] *See,* Warren E. Burger, *Some Reflections on the Problem of Adequacy of Trial Counsel, supra*, 49 Fordham L. Rev. at 9; A. Patridge & G. Bermant, *The Quality of Advocacy in the Federal Courts* 16 (1978); Maddi, *Trial Advocacy Competence: The Judicial Perspective,* 1978 Am. B. Foundation Research J. 105.

[23] On April 18, 1980, Mr. Specter submitted to the district court a Joint Motion for Preliminary Approval of Compromise and Settlement, in which it is clearly stated:

> "Based upon the foregoing analyses, the parties to this Motion embarked upon and concluded comprehensive settlement discussions and executed this Stipulation of Compromise and Settlement which is annexed hereto as 'Exhibit A.' *Plaintiffs* and their attorneys believe that settlement of their litigation with Defendent employer on the terms and conditions set forth in Exhibit A is and would be in the best interests of members of the Class and that the settlement embodied therein is fair, reasonable and adequate." (Emphasis added).

The district court responded in its opinion by saying that "it would be a gross distortion of the events to suggest that counsel attempted to conceal or even delay notifying the court of the plaintiff-objectors dissent once it became irreconcilable." However, the district court gave no support for this statement. It did not cite any evidence to justify this bare conclusion, and in fact no other evidence, except Mr. Specter's misrepresentation, was introduced on this matter at the settlement hearing.

tion to the settlement on March 26, 1980.[24]

The foregoing portrait of Mr. Specter's conduct in negotiating this settlement presents an insidious picture of unethical and incompetent representation of the class. The serious problem of poor representation in the federal courts will be severly aggravated by a precedent upholding the irresponsible actions he committed during the settlement process in this case. By his actions, Mr. Specter has violated the integrity of the class settlement process and victimized the members of the class. This case presents an appropriate vehicle for reinforcing the standards of professional competence and responsibility of lawyers conducting such major litigation in the federal courts. A precedent permitting class attorneys to provide the kind of feeble and inadequate representation demonstrated by Mr. Specter will stand *Handsberry* on its head, thereby establishing the new precedent that absentee class members may be bound by a judgment in the absence of due process.

IV

The Courts Below Applied An Improper Legal Standard

In the instant case, the basic premise of Petitioners' argument is that given the extremely high potential for abuse in the settlement of class action litigation, unless class counsel adequately protect the interests of the class during a settlement, the integrity of the settlement can not be assured, and the class members can not be bound by it. *See, Handsberry v. Lee, supra.* As a foundation for this argument, Petitioners presented to both the District Court and the Court of Appeals the same glaring portrait of Mr. Specter's

[24]The initial objections of the ten class representatives were echoed by a substantial percentage of the class. 20-23% of the absentee class in the Fort Worth area filed objections to the settlement. This figure was acknowledged as "significant if not overwhelming" by the district court. *See, Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 831 (9th Cir. 1976).

inadequate representation during the settlement of this case, as has been rendered to this Court.

As representatives of the class, Petitioners had, and continue to have, a clear, statutorily imposed duty to vigorously represent the interests of the class. *Cohen v. Beneficial Loan Corp.*, 377 U.S. 541, 549-50 (1949); Fed.R.Civ.P.23(a)(4). Given the flagrant conduct exhibited by Mr. Specter during the settlement of this case, Petitioners would certainly have breached their own duties to the class had they failed to present strong objection to the manner by which Mr. Specter had negotiated this settlement. The fact that Mr. Specter abdicated and abondoned his own fiduciary obligations to the class at such a crucial time made it even more imperative that the Petitioners undertake the necessary steps to protect the class.

However, as a basis for its approval of the settlement, the district court chose to impugn the Petitioners' motives for opposing the settlement. As stated by the district court,

> Plaintiff-Objectors opposed the settlement in bad faith, primarily to gain leverage in settling their individual claims against Bell Helicopter at exorbitant figures. Although there were obvious differences of degree among Plaintiff-Objectors, their opposition to the settlement was a product of disappointment and greed, rather than dispassionate evaluation of the settlement against the risks and expense of pressing on with the litigation.

This statement is as utterly erroneous as it is shocking.[25] First, the district court says that Petitioners desired to settle their claims at "exorbitant figures." However, at the settlement hearing, the district court explicitly refused to hear any evidence regarding the validity or extent of Petitioners' individual claims for relief. The district court specifically indicated that such claims had been severed from the settlement at hand, and were not at issue. Only

[25]The Court of Appeals repeats this statement in its own opinion.

evidence relating to the settlement negotiations and the adequacy of class relief was permitted by the district court. Yet, despite this ruling and in the absence of evidence on this issue, the district court reached the arbitrary conclusion that Petitioners attempted to settle their claims at "exorbitant figures." Such unsupported reasoning is a serious misuse of the district court's powers.[26]

Second, the district court says that Petitioners' opposition was motivated by an attempt to gain leverage in settling their own claims. However, as the district court had recognized, the individual claims had been *severed*. Such claims were not part of the settlement. Petitioners' own claims would stand or fall apart from class. Petitioners had no leverage to exercise, since they could neither gain nor lose by the outcome of the settlement. Even if the settlement were rejected by the district court, Petitioners' claims could just as easily be severed in another settlement, if Respondent Bell Helicopter even chose to negotiate one. Thus, the district court's reasoning is wholly illogical.

Third, the district court says that Petitioners' objections were based on greed. However, again, the Petitioners' claims had been severed. No greed could have existed in opposing the settlement, since no possible advantage or benefit could have been gained by the Petitioners in raising their objections. Ironically, only by "approving" the settlement would the Petitioners have stood to gain. By approving the settlement, they could have proceeded to trial on their individual claims without delay; they could have

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[26]At least one other misuse of the evidence by the district court is of importance to this case. In upholding the settlement, the district court stated that all of the eleven Plaintiffs consulted with their attorneys authorized their attorneys "to convey binding settlement offers to defendent Bell and to approve the class settlement on their behalf if accepted." It is true that each of the plaintiffs were requested to and did make a settlement offer for his or her individual claims. However, nowhere, at absolutely no place in the record, is there testimony that each of the class representative specifically authorized settlement for the class if their own settllement offers were accepted. Such evidence does not exist, anywhere. Nor is there evidence anywhere, or at any place in the record that more than two class representatives ever approved the settlement at any one time.

unshouldered the continuing burden of vigilantly representing the interests of the class; and they would not have had to fund the appeal to the United States Court of Appeals, or the petition for certiorari herein filed with this Court.

The district court is at least partly correct in saying that Petitioner's opposition was based on disappointment. As a matter of fact, the Petitioners were much more than disappointed. They were and still are seriously concerned with the irresponsible and fraudulent conduct exhibited by Mr. Specter during the course of the settlement negotiations. Given Mr. Specter's most suspicious actions during the settlement (i.e., negotiating a settment without advising the Plaintiffs of the settlement terms, without permitting the Plaintiffs the opportunity to propose the relief most desired by the class, without advising the Plaintiffs that settlement was even being negotiated; by depriving the Plaintiffs of information by which they could properly evaluate the need for and merits of the settlement; by fraudulently agreeing to a critical, new settlement term without any notice to the Plaintiffs; and by misrepresenting the Plaintiffs' opposition at the time the settlement was filed with the district court), the Petitioners followed a most logical course. They pursued their objections to the settlement, to find out what, in blazes, was going on.

Thus, the district court's conclusion regarding Petitioners' motivation for opposing the settlement in this case is both unfounded and unwarranted. Certainly when the integrity of a class settlement is destroyed by the misconduct of the class attorneys, the settlement is no less objectionable or invalid whatever Plaintiffs' motives are for opposing it.

CONCLUSION

For the foregoing reasons, Petitioners pray that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals in this case.

Respectfully submitted,

By: _____

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APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit

Sarah Linda PARKER, et al.
Plaintiffs-Appellants,

and

Huey P. Mitchell, Appellant

v.

Judith K. ANDERSON,
Plaintiff-Appellee,

and

Bell Helicopter Company, Etc., et at.,
Defendents-Appellees

United States Court of Appeals
Fifth Circuit.*
Unit A

Feb. 18, 1982

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Appeals from the United States District Court
for the Northern Texas District of Texas

Before THORNBERRY, REAVLEY and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

We review the district court's approval of a settlement of a class action suit against Bell Helicopter Company and its award of attorneys' fees. The court's approval was granted over the objection of all but one of the eleven named plaintiffs as well as over the objections of a number of class plaintiffs. Improprieties are claimed to

have occured in the settlement negotiations and the agreement is challenged as inadequate in its terms. In addition, one of the attorneys for the class appeals the amount of attorney's fees awarded to his firm. Finding neither error nor abuse of discretion in the court's approval of the settlement and setting of attorney's fees and costs, we affirm.

Facts

In March 1975, Sarah Parker and Curtis Ford filed a class action suit against Bell Helicopter Company, a division of Textron, Inc., and certain unions, alleging discrimination in employment against blacks and females, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § § 2000e—2000e-17. Between 1975 and 1979 six other lawsuits brought by nine plaintiffs alleged identical discrimination by Bell; two of these suits included unions as defendents.[1] The seven suits were consolidated into the instant proceeding.

Following consolidation, because the attorneys were unable to agree to an apportionment of responsibilities, the district court designated Howard Specter as lead counsel and Huey Mitchell and James Barber as associate class counsel, and assigned them concomitant duties. On April 21, 1978, the district court conditionally certified the litigation as a class action under Rule 23(b)(2) of the Federal Rules of Civil Proceedure. Extensive, reciprocal discovery of the merits began in October 1978 and continued until February 1980.

Trial was scheduled for March 3, 1980. At the pretrial conference on February 6, 1980, it appeared that a settlement might be possible; the court urged counsel to make a good faith effort to

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[1]Subsequently, the claims against the unions were severed. They are still pending.

reach an agreement. On February 29, 1980, counsel reached a tentative agreement and moved jointly for a continuance.[2] The motion was granted and the court instructed counsel to inform the court on or before April 1, 1980, whether a complete settlement could be achieved.

During March 1980, class counsel met with the various named plaintiffs and discussed the tentative settlement proposal. Each of the eleven named plaintiffs authorized their counsel to note their approval of the class settlement, subject to Bell's acceptance of their individual demands which included a demand of $100,000 for one plaintiff, $84,000 for another, and guarantees of promotion to specific jobs for others. Bell countered with an offer of $1,500 each for ten of the named plaintiffs and $2,500 plus a future promotion for the eleventh.

On March 26, 1980, associate class counsel Barber met with all named plaintiffs to discuss the suit and proposed settlement. A discussion of the evidence, particularly the statistics plaintiffs were relying on, was planned. No serious discussion of the lawsuit was possible; plaintiffs were interested primarily in discussing their personal monetary demands. Apparently convinced that Bell's offer to them was too little, nine of the eleven plaintiffs expressed

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[2]The motion reads:

> As previously reported to the Court infomally, extensive good faith negotiations have been taking place between lead counsel for the Plaintiff class and counsel for the Employer-Defendant. These negotiations have now reached the point that substantial progress has been made, and counsel believe a reasonable probability exists that a full settlement can be reached.
>
> Counsel, therefore, jointly requests a continuance for a status conference on April 1, 1980. By that date counsel believe that they will be in a position to inform the Court either that a settlement has been reached and concluded and in fact is ready for presentation to the Court or that a settlement is impossible. Counsel will extend every effort to the end that a settlement be reached.

opposition to the settlement.[3]

On March 29, 1980, the attorneys for the parties approved a proposed Stipulation of Compromise and Agreement which embodied 18 of the 19 points contained in the tentative agreement confected on February 29, 1980. The proposal required Bell to deposit $1,250,000 in an interest bearing account to be distributed to the class members when and as directed by the court.[4] Certain affirmative relief measures projected to cost Bell approximately $1,000,000 to implement and maintain, were included. The proposal was made applicable only to the members of the class; Bell agreed to sever the individual claims of the named plaintiffs. Those claims are still pending.

On April 8, 1980, lead counsel Specter met with the named plaintiffs, intending to discuss the proposed settlement and his analysis of the stregnths and weaknesses of the evidentiary base of their suit. The effort was futile; the plaintiffs focused on and voiced disagreement with Bell's counter to their individual claims. Specter offered to meet separately with each plaintiff. No one accepted his invitation.

On April 10, 1980, several plaintiffs moved to enroll Charles Padorr as their attorney for purposes of objecting to the settlement. By June 21, 1980, all plaintiffs had dismissed their original attorneys except the non-objecting Judith Anderson, who continued to be represented by Mitchell. On April 18, 1980, the proposed-

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[3]The trial court capsulated the evidence about the meeting as follows:

> Angry and offended at what seemed to them small counteroffers, and fortified with a case of beer, the plaintiffs were ill disposed to listen to any explanation of the deficiencies of the statistical case against Bell. Posturing and wild talk took the place of reasoned analysis. At the close of the meeting, the plaintiffs voted to "reject" the settlement.

[4]Bell had made an anticipatory deposit on March 3, 1980.

ment was filed along with a motion for preliminary approval.

On May 29, 1980, the district court defined a subclass of "objectors" and appointed Padorr as their counsel with authority to conduct discovery into the propriety of the settlement. On July 25, 1980, the court preliminarily approved the settlement for purposes of notification of the class. After considering filings from all parties, including the objectors, the court approved forms of notice for dissemination to the class, direct and by publication. This notice advised that a hearing would be conducted to examine the fairness and adequacy of the settlement.

After being continued once, the hearing on the proposed settlement commenced on October 16, 1980. For two days the court received evidence from the proponents and opponents of the proposed settlement. The hearing extended into a third day, when the court received evidence on the issue of fees for the class attorneys.

On March 11, 1981, the court filed a comprehensive Memorandum Opinion and Order which found the settlement to be fair and reasonable. The court also assessed fees for the various class attorneys and allowed their recovery costs incurred in preparing the matter for trial. On April 10, 1981, the court amended the earlier order to correct clerical errors, to effect one substantive change, and to provide for post-settlement attorney's fees and apportionment of interest accruing on the deposit. This appeal followed.

Objectors maintained that the settlement should be rejected because (1) the terms are not fair and reasonable, (2) the class attorney did not properly represent the class in negotiations, and (3) the payment of attorneys' fees out of the class settlement fund creates and impermissible conflict of interest. Mitchell appeals his award of attorney's fees.

I. *Fairness and Adequacy of the Settlement*

Rule 23(e) requires court approval of compromise settlements of class actions, but it is silent as to the standard that is to be applied. Nonetheless, the rubric is now well established that the court will not approve a settlement unless it is found to be fair, adequate, and reasonable. *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir. 1981); *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977). In determining the adequacy and reasonableness of the proposed settlement, the court does not adjudicate the dispute, for as we noted in *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971): "[i]n examining a proposed compromise ... the court does not try the case. The very purpose of the compromise it to avoid the delay and expense of such a trial." In evaluating settlement proposals, six factors should be considered: (1) whether the settlement was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of the discovery completed; (4) the factual and legal obstacles prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinion of the participants, including class counsel, class representative, and the absent class members. *See Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S. Ct. 1020, 59 L. Ed.2d 74 (1979).

Our appellate review of the district court's approval of a settlement is limited; an approved settlement will not be upset unless the court clearly abused its discretion.[5] *Young v. Katz*, 447 F.2d 431,

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[5]In a recent opinion affirming the approval of a class action settlement, the Ninth Circuit articulated the role of the trial court and the need to afford it broad discretion:

Class actions vary widely in their circumstances, and the procedural protec-

(continued)

432 (5th Cir. 1971). Similar to the function of the trial court, our limited review rule is a product of the strong judicial policy favoring the resolution of disputes through settlement. *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980).

In deciding whether a clear abuse of discretion has occured, we share the view of our colleagues of the Second, Fourth and Eighth Circuits that, absent fraud or collusion, the most important factor is the probability of the plaintiffs' success on the merits. *See, e.g., Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976); *Grunin v. Internation House of Pancakes*, 513 F.2d 114 (8th Cir. 1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) ("If the settlement offer was grossly inadequate ... it can be inadequate only in light of the stregnth of the case presented by the plaintiffs.")

In the case at bar, the court approved a settlement which provided, because of the accrued interest, a cash recovery exceeding $1,440,000 and 15 specifications of employment enhancement which the court concluded would cost Bell approximately $1,000,000 to implement and maintain. The district court's detailed findings and conclusions, which include a thorough history and analysis of the litigation, reflect a careful evaluation of the settlement in light of the six factors set forth above.

After reviewing the entire settlement and pretrial record, the court concluded that the plaintiffs had "only a marginal chance of

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tions and judicial responsibilities are necessarily only generally defined. Broad discretion is granted to the trial judge, enabling him or her to respond fluidly to the varying needs of particular cases. Therefore, although certain factors must be considered and certain proceedures must be complied with, much of the judicial oversight of class actions is in the form of the sound discretion of the District Court.

Mendoza v. United States, 623 F.2d 1338, 1334 (9th Cir. 1980), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 (1981) (citations omitted).

recovery in the five million dollar range," and that even if they were successful in recovering a judgment in the more realistic range of three to five million dollars an appeal raising serious issues was likely. Review and analysis of the plaintiffs' affidavits, testimony, and the opinion of their expert statistician, impressed the district court that substantial weaknesses existed in their case. The trial judge noted "a significant risk of failure to show liability on the major backpay issues," and that the issues concerning the validity of Bell's education and experience requirements for hundreds of different jobs would be disputed hotly at trial, with sharply conflicting testimony about the statistical evidence, presenting an "all or nothing confrontation of unpredictable outcome." The judge also saw difficulties with the issue of certifying a class that included unhired applicants and Bell's facility in Amarillo. Problems were presented by the question of showing discriminatory intent for Title VII claims not based on adverse impact, and the validity of the causes of action based on affirmative action plans. Weighed against this background the court concluded that the monetary award and the provision for affirmative relief constitued a fair, reasonable, and adequate settlement.[6]

We are not persuaded that the trial court erred either in its assesment of the probabilities of success or the range of recovery. Objectors offered no evidence at the settlement hearing concerning these issues. They were represented the by able and experi-

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[6]Even if the trial judge had found a comfortable probability that plaintiffs would have recovered $5,000,000, that factor would not mandate that the order approving the settlement be vacated. We agree with the comments by the Second Circuit when it confirmed the approval of a settlement which constitued only 12% of potential recovery in *City of Detroit v. Grinnell Corp.*: "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." 495 F.2d at 455. The court continued in a footnote: "In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.* at n.2.

enced counsel who had been empowered to conduct all necessary discovery and allowed adequate time to do so.[7] We find no basis in this record for the contention that the trial court abused its discretion in finding this settlement fair and reasonable.[8]

II. *Fairness and Adequacy of Representation*

Objectors contend that the attorneys did not represent the class fairly and adequately during negotiations. They contend that counsel failed to consult with them, withheld certain information, and misrepresented material matters. The record does not support any of these assertions.

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[7]Conclusion 16 of the trial court's opinion reads, in pertinent part:

> Despite their access to the file and to compulsory discovery, objectors adduced no evidence of any weight to rebut proponents' *prima facie* showing that the class case was not strong enough to demand larger monetary awards or additional affirmative relief.

[8]Objectors challenge the 15 affirmative relief provisions, nine because they do not go far enough and six because they duplicate existing programs. We reject the challenge as to the nine for the reasons discussed in text. The trial judge concluded that in the arms length negotiations, the strength of plaintiffs' case would not support the insistence of a more favorable result. We are not prepared to disturb this judgment call as an abuse of discretion.

As to the contention that six provisions are duplicative of existing programs, we simply do not agree. As an example, objectors insist that the provision requiring Bell to publicize the existence and purposes of its "Employee Skills Profile and Questionnaire," is duplicative and therefore meaningless. This document, when used, lists the skills, education, and work experience of Bell employees. This provision requires Bell to provide personnel to encourage and assit both old and new employees to complete and update these profiles. The record reflects that the profile program was available previously but it was not publicized and it was not implemented. The proposed program would be structured to insure utilization, to the advantage of employees. In this context, we do not find this procedure duplicative. Nor do we find the others defective for similar reasons.

This inquiry must be placed in proper perspective. Objectors' personal claims were not before the district court and are not before us; they were severed and are still pending. Rather, the objectors stand before us as representatives of the absentee class members. The question presented by this appeal is whether the class counsel provided fair and adequate legal representation to the class as a whole. Necessarily, much of what counsel does for the class is by and through the class representatives, but that is neither the ultimate nor the key determinant. The compelling obligation of class counsel in class action litigation is to the group which makes up the class. Counsel must be aware of and motivated by that which is in the maximum best interests of the class considered as a unit.

The duty owed to the client sharply distinguishes litigation on behalf of one or more individuals and litigation on behalf of a class. Objectors emphasize the duty of counsel in non-class litigation. The prevailing principles in that situation cannot be imported wholesale into a class action setting. The fairness and adequacy of counsel's performance cannot be gauged in terms of the representation of the named plaintiffs. In addressing this point in our recent decision of *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 508 (5th Cir. 1981), we stated:

> Appellants' argument that the settlement cannot be applied to them because they did not authorize their attorney ... to settle the case or otherwise consent to the settlement is also easily disposed of. Because the "client" in a class action consists of numerous unnamed class members as well as the representatives, and because "[t]he class itself often speaks in several voices ..., it may be impossible for the class attorney to do more than act in what he believes to be the best interest of the class as a whole ..." *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978).

The courts have recognized that the duty owed by class counsel is not dependent on the special desires of the named plaintiffs. It has been held that agreement of the named plaintiffs is not essential to approval of a settlement which the trial court finds to be fair and reasonable. "Because of the unique nature of the attorney-client relationship in a class action, the cases cited by appellants holding that an attorney cannot settle his individual client's case without the authorization of the client are simply inapplicable." *Kincade*, 635 F.2d at 508; *Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 n.19 (4th Cir. 1975), *cert. denied*, 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976) ("Appellants do not argue, nor may they under the authorities, that the assent of the class plaintiffs is essential to the settlement, provided the trial court finds it fair and reasonable."); *Bryan v. Pittsburgh Plate Glass Co.*, 493 F.2d 799 (3d Cir.), *cert. denied*, 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974); *Robertson v. National Basketball Ass'n*, 72 F.R.D. 64 (S.D.N.Y.1976); *Purcell v. Keane*, 54 F.R.D. 455 (E.D.Pa. 1972). *Accord, Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied.* 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979). The rationale implicit in these decisions is sound: the named plaintiffs should not be permitted to hold the absentee class hostage by refusing to assent to an otherwise fair and adequate settlement in order to secure their individual demands. The trial court was not impressed favorably by the motivation of the objectors, finding as a fact that: "Plaintiff-objectors opposed the settlement in bad faith, primarily to gain leverage against Bell at exorbitant figures."

We measure class counsel's performance of the duty to represent the class fairly and adequately as we gauge the fairness and adequacy of the settlement. It will follow generally that an attorney who secures and submits a fair and adequate settlement has represented the client class fairly and adequately. In this instance, we affirm the trial judge's findings as to the settlement and necessarily reject the contention that the attorneys' performance in confecting the settlement was inadequate.

Objectors contend that counsel did not consult with them in a meaningful way and that they failed to disclose some matters and misrepresented others. These allegations are contrary to factural findings by the trial judge and are not supported by the record.

Consultation

Objectors complain of the inadequacy of contacts between counsel and the class members, especially as regards discussions of relative strengths and weaknesses of their case. Objectors point to the paucity of contact between counsel and the class representatives, pointing particularly to the five month period immediately preceding the February 29, 1980, tentative accord. The record does not support this assertion.

We note over 30 contacts between a member of Specter's staff and the class representatives during that period. In addition, the record reflects substantial contacts between class cousel and the representatives during March and April of 1980. During that period, the class attorneys advised the representatives of the terms of the proposed settlement, evaluated the evidentiary bases for the case, held meetings to discuss the settlement, and attempted to negotiate a monetary increase for some of the individual representatives.[9] Objectors suggest that these contacts are immaterial, con-

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[9]For example, in a letter to plaintiff Mackey, dated March 25, 1980, lead counsel devoted approximately four pages to a detailed evaluation of the strengths and weakensses of the case. In summarizing his purpose for writing he stated: "I want you to have a clear understanding of the risks which you are running before you decide what course to take and whether to seek to settle or take your chances in court." A similar letter was sent to plaintiff Odom.

In addition, on at least two occasions, it was the named plaintiffs that refused to accept counseling and evaluations offered by class counsel. After the February 29 letter but before the final settlement agreement, associate counsel Barber met with plaintiffs to discuss the case. Instead of rational discussion, he was confronted with hostility and anger. After the March 28 agreement, but before the settlement hearing, lead counsel offered to discuss settlement with plaintiffs individually. The invitation went begging.

tending that the February 29 letter was, in effect, the final settlement agreement. This objection is not well taken. As appellees point out, the tentative agreement was conditional, incomplete, and subject to approval, including the ultimate approval of the court.

The trial court reached the following conclusions: "Counsel consulted regularly and frequently with the class representatives throughout the case"; during March "all named plaintiffs consulted their attorneys about the class action settlement and authorized them to convey binding offers to Bell and to approve class settlement on their behalf if accepted," ...; and "lead counsel behaved appropriately in negotiating the tentative settlement as spokesman for the class, immediately advising the named plaintiffs and associate counsel of its terms by letter, and ascertaining the named plaintiffs' reaction to the settlement before presenting it to the court." We perceive no error in these findings.

Disclosure

Objectors contend the class attorneys failed to inform the district judge that all but one of the named plaintiffs objected to the settlement agreement. Judge Mahon, however, concluded that "it would be a gross distortion of the events to suggest that counsel attempted to conceal or even delay notifying the court of the plaintiff-objectors dissent once it became irreconcilable." In addition, in his May 27, 1980 order, the judge observed that by April 10, 1980, four of the objectors were dissatisfied with the settlement and had taken steps to discharge Mitchell as their attorney. Obviously, the trial judge is in the best position to know whether he was or was not informed of the opposition to the settlement. His finding in this regard is affirmed.

Misrepresentation

The letter of February 29, outlining the terms of the tentative agreement, contained no reference to a time limit for the injunctive

relief against Bell. The final agreement of March 28 contained a provision limiting injunctive relief to four years. Objectors claim that the failure of class counsel to inform them of this modification was misrepresentation. To support their contention, they point to the March 25 letter from Spector to Mackey explaining the terms of the settlement; that letter did not advise of the limitation.

Specter testified at the settlement hearing that any provision in the final agreement that was not in the February 29 letter was agreed to on March 28. The four year term for injunctive relief is one of those provisions. This testimony is not controverted. Since counsel was not aware of this provision during the conferences and communications with the plaintiffs in March 1980, his failure to inform them of this element cannot constitute misrepresentation. We find no merit in this contention.

Attorney's Fees

Objectors contend the settlement should be set aside because the manner in which the attorney's fees were awarded created an impermissible confict of interest. We agree with objectors that awards of attorneys' fees in the class action context present a potential for abuse, but we find no impropriety in the instant case.

The fees of class action attorneys have been paid historically out of the fruits of their labors. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). The amount of the attorneys' fees must be approved by the district court at the settlement hearing required under Rule 53(e). A full hearing is required.[10] The trial judge has a responsibility to

[10] A full hearing is one in which notice is given to the class of the proposed attorneys' fees, counsel offers relevent evidence, and is available for cross-examination, and objectors have an opportunity to be heard. *Foster v. Boise-Cascade, Inc.*, 577 F.2d 335 (5th Cir. 1978), *affirming* 420 F.Supp. 674 (S.D.Tex.1976); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1971).

assess the reasonableness of the attorneys' fees in light of the standards enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974),[11] and to enter findings of fact and conclusions of law setting out the basis for the fee award. *Piambino v. Bailey*, 610 F.2d 1036 (5th Cir. 1980). *See Norwood v. Harrison*, 518 (5th Cir. 1978). When these procedures are complied with, our review of a trial court's award is confined to determining whether the trial court abused its discretion.

In the present case, the settlement agreement provided that "all Plaintiffs' attorneys' fees, expenses, and costs awarded by the Court shall be paid from the Settlement Fund" and that Bell "would have no further liability as to fees and costs than from the Settlement Fund except with respect to fees earned or costs incurred subsequent to the date of execution of this Stipulation." The agreement did not purport to set the amount of attorneys' fees. Instead, the third day of the settlement hearing was devoted to the question of attorneys' fees. That the trial court set the fees in light of the *Johnson* standards is evident from its opinion which explains in detail the methodology and basis for the various awards.[12] We find no abuse of discretion in the setting of attorneys' fees.

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[11]The *Johnson* factors involved are: (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitation imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the political "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-19. In *Piambino v. Bailey*, we added two additional factors: the difficulty of the case and the uncertainty of the recovery.

[12]The fact that one of the class attorneys is an appellant, contesting the amount of his fees, attests to the careful and exacting manner in which the trial court analyzed the fee petitions and determined the amounts to award.

The appellants urge us to find that regardless of the care taken by the trial judge, a settlement providing for attorneys' fees payable out of the settlement fund creates an impermissible conflict of interest, citing *Piambino v. Bailey* and *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977). Their reliance on these cases is misplaced.

In *Prandini*, the settlement agreement provided for payment of a certain sum to the class and another set sum to counsel. The two separate funds were negotiated simultaneously and the court recognized the inherent conflict. Similarly, in *Piambino*, the settlement agreement provided for the payment of a specific amount of attorneys' fees out of the settlement fund. The district court did not make an independent evaluation of the reasonableness of the fees, stating that is was:

> not being asked to set a reasonable attorneys' fee in conjunction with the instant settlement; rather the court is being presented with a proposed settlement, agreed to by all parties and unopposed by the class, which incorporated an award of attorneys' fees in the amount of $750,000.00 as a vital part of the settlement.

610 F.2d at 1328. We held that the district court improperly abdicated its responsibility to assess the reasonableness of the attorneys' fees and reversed its approval of the settlement.

Neither situation is presented in the instant case. The amount of the attorneys' fees was left entirely to the discretion of the court. The evil feared in some settlements—unscrupulous attorneys negotiating large attorney's fees at the expense of an inadequate settlement for the client—can best be met by a careful district judge, sensitive to the problem, properly evaluating the adequacy of the settlement for the class and determining and setting a reasonable attorney's fee in light of *Johnson* standards. We find no abuse of

discretion in the present case and affirm the award of attorneys' fees and costs recoveries to the attorneys.

Huey Mitchell's Fees

Mitchell requested $72,235.20 in fees in fees; the trial court awarded $21,980.50. In arriving at this amount the trial court obviously considered the *Johnson* criteria. Mitchell's fee petition presented a particular problem. His fee request was not documented properly. It did not show that the fees were for services that benefited the class, a requirement necessarily imposed on class counsel. Services rendered for the individual claims of named plaintiffs or claims against the unions, all of which were severed and are pending, could not be compensated from the funds belonging to the class. Further, Mr. Mitchell's petition was vague and unclear. Even after he was given an opportunity to revise and clarify his petition, Mitchell failed to show how many hours he contended were compensable under the directives imposed by the trial court on all of the class attorneys. Following Mitchell's failure to adduce a definitive petition, the trial court gleaned the record and found 344 hours to be compensable. Mitchell was awarded sixty-five dollars per hour for his services. The time for the other associates in Mitchell's firm was compensated at five dollars per hour, since court concluded that these services were performed by clerks.

Under these circumstances, an affirmance is mandated. As we held in *Carr v. Blazer Financial Services, Inc.*, 598 F.2d 1368, 1371 (5th Cir. 1979):

> The burden rests on the party seeking an attorney's fee award to file a fee application and proffer proof going to the *Johnson* guidelines before the trial court. While a trial court should adhere to the *Johnson* standards, it is not to be expected, as plaintiff suggests, that the trial court must take the initiative in ferreting out the relevant facts.

The burden place on the trial court by the inadequate submission was recognized by Mitchell in his testimony at the settlement hearing. Mitchell conceded that no one could determine definitively how much time he had spent on behalf of the class by reviewing the submissions he made in his fee petition. We can do no better job than the trial judge. Indeed, he is in a superior position to judge a fair fee award. He presided over this case, observing the performance of counsel. In this instance, with an admittedly inadequate record, we are doubly chary of rejecting the trial court's findings. We discern no abuse of discretion.

The judgment of the district court is AFFIRMED in all respects.

APPENDIX B

Memorandum Opinion And Order of the United States District Court for the Northern District of Texas, Fort Worth Division

Dated March 10, 1981

SARAH LINDA PARKER, ET AL., Individually and on Behalf Of All Other Persons Similarly Situated	§	
VS.	§	CIVIL ACTION NO. CA4-75-61-E (Conditionally Consolidated)
BELL HELICOPTER COMPANY, A Subsidiary Division of TEXTRON, INC., ET AL	§	

MEMORANDUM OPINION AND ORDER

On April 21, 1980, the parties filed with the Court their Stipulation of Settlement and Compromise of the class claims. After a full hearing on the settlement and the amount of a reasonable attorney's fee, the Court holds that the proposed settlement is a fair and adequate compromise of the class claims.

I. Prevailing Parties.

A named plaintiff representative who achieves benefits from the class through settlement of the same type as could have been obtained by trial is a prevailing party for purposed of 42 U.S.C. § 1988 *Maher v. Gagne*, ____U.S.____, 100 S.Ct. 2570 (1980). However, where a variety of distinct issues and/or defendants are joined in one action and it is apparent that plaintiffs did not prevail in any arguable way upon certain of those claims, the court may in its discretion eliminate the time and expenses devoted to the unsuccessful claims from its award of reasonable attorney's fees.

Jones v. Diamond, 594 F.2d 997, 1026 (5th Cir. 1979) *aff'd en banc* No. 78-1289 slip op. 3729, 3750 (January 29, 1981). Although this procedure serves primarily to alleviate untoward expense on defendants in ordinary lawsuits, it is a fiduciary concern in the context of a class action where the failure to eliminate collateral claims may permit the representative to exact contributions from the class to finance his own unique recovery in which the class will not share.

The Court holds that the named plaintiffs are not yet prevailing parties on their unresolved individual claims against Bell, and/or the Unions.[1] Nor can the named plaintiffs claim to be prevailing parties in their status as objectors under the *Jones v. Diamond* standard. No fees or expenses attributable solely to these matters may be paid from the settlement fund belonging to the class. Plaintiffs may renew their petitions for the balance of their fees and expenses if and when they prevail upon their severed individual claims.

II. Reasonable Attorney's Fees.

The Court finds that $345,094.50 plus expenses of $157,693.15 is a reasonable attorney's fee to be paid from the settlement fund and distributed as set out in Attachment A. In calculating these fees and expenses, the Court adopted what is essentially a "lodestar" approach applying the criteria prescribed in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). *See, Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 583 n. 15 (5th Cir. 1980).

A. Time and Expenses.

1. Lead and Associate Counsel. On April 19, 1977, this Court

[1] See procedural summary of case in Section II.A., infra, p. 13.

entered its pre-trial order designating Howard Specter as lead counsel for the class and laying out his responsibilities as opposed to those of associate counsel. For convenience and clarity, the pertinent portions from Section III of that order are recited here:

> The Court is sorely disappointed that counsel for the various individual plaintiffs were unable to agree among themselves as to who should be lead counsel for the conditionally consolidated and certified class. The Court is of the opinion that this is a matter better left to the discretion of the various parties and attorneys than to the Court. Nevertheless, where counsel cannot agree, it is incumbent upon the Court ... to appoint a single lead counsel.
>
> [A]fter careful consideration of the briefs and presentations of contending counsel, the Court is of the opinion that it should designate Mr. Specter as lead counsel.
>
> Since Mr. Specter's law offices are in Pittsburgh, Pennsylvania, the Court is of the opinion that he should be required to file a notice designating a local associate lead counsel, whose duties will include conveying information and documents between the Court, local counsel, and the parties, on one hand, and Mr. Specter on the other. The local associate lead counsel must also be available to stand in for Mr. Specter as lead counsel should the exigencies of some future situation so require.
>
> * * *
>
> Lead counsel shall have the primary responsibility to initiate and conduct discovery, to prepare and file notices, motions and briefs, and to act as spokesperson for plaintiffs at any future pretrial confrences. Lead counsel is responsible for coordinating the efforts of all attorneys of record in order to minimize duplication and to accommodate reasonable scheduling of matters before the Court. Lead counsel is res-

ponsible for providing fair representation to all members of the conditionally certified and consolidated class. Lead counsel may, with notice to the Court and/or counsel for defendant Bell Helicopter where prudent, delegate responsibility to other counsel.

* * *

All counsel of record for plaintiffs in the consolidated actions other than lead counsel and associate lead counsel shall be deemed associate counsel for plaintiffs.

Associate counsel retain the responsibility of insuring that the named plaintiffs that they have undertaken to represent do indeed receive fair representation. Associate counsel may, after notice to lead counsel, speak for their individual named plaintiffs, file supplemental memoranda, and conduct non-duplicative supplemental discovery, to or positions of their individual named plaintiffs requires such supplementation.

Under the Court's division of labor, associate counsel had only limited responsibility to the class. Unless their efforts were enlisted on behalf of the class, their primary obligation was to see that the named plaintiffs' separate interests were not disregarded.

The Court has generally allowed time expended by all counsel on non-union matters prior to the appointment of lead counsel. Although all associate counsel uniformly ignored the Court's instruction to attach a certificate to any documents filed by them stating whether lead counsel had requested, approved, or disapproved its filing, it is apparent from a review of the file, the correspondence, and attorney's fee petitions that lead counsel did delegate class-related projects to associate counsel on a number of occasions. The Court has allowed time and expenses incurred by associate counsel after April 19, 1977: (1) in performing the class-related projects delegated to them by lead counsel; (2) in attending the joint strategy meetings held in Los Angeles and Pittsburgh; (3)

in attending the class certification hearing held July 25, 1977; (4) in discussing the settlement agreement with their individual clients and attending the settlement hearing; and (5) in preparing their fee petitions. The Court has disallowed time and expenses incurred by associate counsel (1) in conducting discovery solely on individual plaintiffs' claims against Bell or the Unions; (2) in monitoring the case by reviewing correspondence and documents filed by other counsel or by attending depositions or hearings also attended by lead counsel Specter; and (3) in pursuing lead counsel status. The Court makes no judgment as to whether the fees disallowed here were reasonable and necessary in the pursuit of the severed individual claims.

2. Associate Lead Counsel. Fort Worth attorney Wallace Craig was designated associate lead counsel as required by the Court's Order of April 19, 1977. His primary function as local counsel and coordinator for Mr. Specter was substantially different from that of other associate counsel and merits somewhat different treatment for fee purposes. Time spent by Mr. Craig in hearings or in many of the dispositions that were also attended by Mr. Specter is disallowed as duplicated effort; however, time spent monitoring the file and attending depositions of the named plaintiffs has been allowed since Mr. Craig was instucted by the Court to be prepared to appear in Mr. Specter's stead if it became necessary. As a result of Mr. Craig's peculiar role, certain costs that are ordinarily treated as part of an attorney's overhead were greatly inflated without a corresponding increase in the number of professional hours worked, e.g., local milage and clerical services. These requested expenses have been allowed with minor exceptions because the Court is satisfied that they were necessitated by the peculiarities of this action and could not realistically be recouped as overhead through professional fees.

3. Experts and Nonprofessionals. The services of experts and consultants have been allowed as expenses of suit without cavil. The fees charged for the service of paralegals, law clerks and clerical personnel, however, are a matter of some difficulty to the

Court. Although delegation of the more mundane tasks of litigation to law clerks and attorney of lesser experience at a commensurately lower hourly charge has long been one of the first principles of an efficient law practice, the modern trend toward utilitizing paraprofessionals carries some potential for abuse. There are doubtless many administrative duties required by the litigation that do not call for the expert legal judgment of an attorney; and few sensible clients would balk at the substitution of a qualified paraprofessional in those functions if it resulted in lower costs. However, there are many essentially clerical tasks, such as typing, filing, copying, local deliveries, etc., for which no professional or paraprofessional fees can be justified, even thought there are necessary to the litigation and are enhanced by some specialized mechanical skills or familiarity with the case. These word processing functions are part of an attorney's overhead and no hourly charges for performing them have been a allowed except in the case of Mr. Craig.[3]

4. Documentation of Fees and Expenses. The Court required the attorneys to support their fee petitions with contemporaneous time records showing the number of hours expended, the subject matter, the date performed, and the person performing the work. Where the affidavits or summaries conflicted with the documentation, the Court relied upon the documentation. Illegible, incomplete or ambiguous time and charge slips were eliminated unless the uncertainty could be cured by reference to the docket sheet or correspondence. The Court did not insist upon receipts or even accounting ledgers to document expenses so long as they were itemized and adequately described. Long distance charges for

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[2]Although courts should be alert to the possibility of unauthorized practice of law by paraprofessionals, there is no indication in this case that lay employees were attempting to exercise legal judgment.

[3]Mr. Craig was allowed $5/hr. for deliveries and for extraordinary copying time, i.e., time in excess of one hour per project. Time spent at the Clerk's office tabulating class correspondence was allowed at the rate of $10 per hour.

which no callee was indicated were disallowed.[4]

5. Fee Petitions of Mackey and Odom. The fee petitions filed by plaintiffs Mackey and Odom seeking reimbursement from the fund for tuition, mileage, investigations, "consultant's fee," snacks and like expenses were categorically denied. Prevailing parties are entitled only to an award of "reasonable attorney's fees" under 42 U.S.C. § 1920. Neither of these provisions supports a general right of reimbursement for a plaintiff's time and personal, out-of-pocket expenses, whether or not the plaintiff purports to represent himself.

6. Number of Hours Expended. The court finds that the total number of hours expended in pursuit of class issues was reasonable and necessary given the nature and procedural history of the case. Plaintiffs alleged a state-wide class that had been subject to both disparate impact and purposeful discrimination over a period of almost ten years. Consolidation of the separate actions, which consumed a considerable block of time, brought eleven fairly diverse plaintiffs into the case and permitted certification of an across-the-board class that spanned a number of potentially conflicting subclasses. Commensurate with the huge back pay award that might be obtained, discovery was aggressive and thorough. Faced with staggering potential liability as well as the sheer expense and inconvenience of production, and alarmed at the confidential nature of certain information sought by plaintiffs, defendant Bell stoutly resisted much of the discovery and repeatedly sought to narrow the broad class.[5]

Despite the number of plaintiffs and attorneys, this has been an exceptionally well-managed case from the entry of the April 19, 1977, pre-trial order to the present date. Based upon recollection

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[4]Mr. Mitchell was pointedly cross-examined on the coherence and accuracy of his fee petition at the settlement hearing. He later revised his petition, greatly reducing the expenses claimed. However, a tally of the time and charge slips revealed a sizable error in the fee request as well.

[5]The objections posed by defendant Bell were hardly frivolous. See the discussion of rates in Section I.B.

corroborated by a review of the volumnous file, the Court's overall impression is that the 3,405.75 hours devoted by the attorneys to class issues reflect little wasted effort.

7. Expenses. The Court has examined the attorneys' itemizations of their out-of-pocket expenses and finds that their outlays for travel, long distance telephone calls, copying, deposition transcripts, expert's fees, and other miscellaneous expenses were reasonable and necessary given the potential recovery and the preparation required for major class litigation.

B. Rates.

The attorneys varied not only in their expertise but in the degree to which they actually bore the responsibility for the case. Few of the attorneys have requested an hourly rate that is much divergent from the Court's assessment of their objective qualifications and, more importantly, of their actual display of skill, maturity, diligence, efficiency, and those other traits that credentials do not always assure. However, the time sheets go back as far as 1974, and the requested rates obviously represent the price that such services would draw in 1979 and 1980. Rather than determine rates graduated by year, the Court has used an average rate for each attorney intended to be a composite of his expertise and role as well as the general fact that the fees were contingent and, therefore involved an element of risk; the actual length of time between performance of service and collection; the extent to which the attorney financed costs; the specialization required; the extent to which the case precluded other employment; and the difficulty of the issues with which that attorney was presented.

1. Howard Specter. The Court finds that $125/hr. is a reasonable rate for plaintiffs' lead counsel. Mr. Specter brought to plaintiffs' side an expert's understanding of major civil rights and class litigation as well as the financial resources and sophistication of his firm, counter-balancing the formidable defense attorneys retained by defendant Bell. Mr. Specter designed and very ably implemented the plaintiffs' ambitious discovery program. Throughout the

case, difficult and substantial questions were raised by defendant about the proper scope of Title VII discovery and the elusive requirements of Rule 23a, for which the law provided guidance but few answers.[6] With one exception, these issues were researched and argued by Mr. Specter or under his immediate direction. The general quality of the work produced under his supervision was excellent.

Mr. Specter made his appearance in early 1977. Since that time he has devoted 20% of his time to this case alone and his firm has advanced well in excess of $120,000.00 in expenses.

2. Michael Buchwach. The Court finds that $75/hour is more than reasonable for Mr. Buchwach's contribution. Mr. Buchwach was Howard Specter's principle associate beginning in early 1979. It is apparent that he had a major strategic role, that he performed much of the very fine research in support of plaintiffs' positions, and that he was active in the preparation and analysis of discovery.

3. Beth Troiano. The Court finds that $50/hour is a reasonable basic rate for work performed in 1979 by an attorney with 2-3 years experience in private practice and with previous experience as a federal law clerk.

4. Duncan MacCallum. The Court finds that $40/hour is a reasonable basic rate for research performed in 1980 by an attorney with less than a year's experience.

5. Wallace Craig. The Court finds that $75/hour is a reasonable rate for Mr. Craig's services. Although Mr. Craig is not a specialist in major class action litigation, he has considerable trial experience in both state and federal courts. He was designated associate lead counsel by Mr. Specter in 1977 and has served in that capacity to the Court's and Mr. Specter's satisfaction. The

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[6] Although the elements of Title VII and 42 U.S.C. § 1981 are fairly clear and well settled where individual actions are involved, the class action is a peculiar vehicle fraught with some of the most abstruse and logically subtle distinctions known to the law. See, e.g., *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166 (1980); *United States Parole Commission v. Geraghty*, 445 U.S. 389, 100 S.Ct. 1202 (1980).

Court notes that the $7,000 in expenses carried by Mr. Craig is a sizable burden for a small law office.

6. Jim Barber. The Court finds that $85/hour is a reasonable rate for Mr. Barber's services. Mr. Barber has had a great deal of experience in civil rights and class litigation and has been appointed lead counsel in several race and sex discrimination cases. Mr. Barber appeared in this action in 1977 representing plaintiff Dorothy Spears and was responsible for preparation of the plaintiffs' principle post-hearing brief on certification, as well as plaintiffs' brief filed November 28, 1978, opposing defendant's motion for a permanent injunction. These projects assigned to him by lead counsel Specter drew heavily upon his experience and accumulated knowledge of the area. Mr. Barber was also active in presenting the settlement proposal to the named plaintiffs as a group and in attempting to dissuade them from their self-interested opposition to the proposal. Mr. Barber's firm did not carry a significant amount of expenses.

7. Kenneth Molberg. The Court finds that $50/hour is a reasonable rate for Mr. Molberg's services. Mr. Molberg is moderately experienced in civil rights litigation but has not played a prominent role in this action. Most of Mr. Molberg's time attributable to class issues was expended in 1976 and early 1977.

8. Steve Thorpe.[7] The Court finds that $65/hour is a reasonable rate for Mr. Thorpe's services. Mr. Thorpe has gained extensive experience since 1975 by assisting Mr. Barber with his civil rights and class litigation and more recently has been handling similar cases on his own. Most of Mr. Thorpe's time attributable to class issues in this action was expended in 1979 and 1980.

9. Law Offices of Huey Mitchell. A reasonable hourly rate for Mr. Mitchell is difficult to assess. Although Mr. Mitchell is not a specialist in class litigation and in many ways was the least efficient and most erratic of the attorneys on the case, he is an attorney of many years experience with a large portion of his practice devoted to civil rights. He represented eight of the named plain-

[7]Mr. Thorpe was also a law clerk for Mr. Barber prior to his formal association.

tiffs, filed the original lawsuits, and was lead counsel for all practical purposes in the early years of the litigation. After the Court's 1977 order appointing Howard Specter as lead counsel, however, Mr. Mitchell assumed a secondary role with much of his time being spent on the Union claims and in reviewing the discovery and motions filed by other attorneys. The Court is of the opinion that $50/hour was the top rate charged by attorneys with more than five years of experience for out of court time expended on complex business litigation in the years 1974-1976. Although Mr. Mitchell might not have commanded that rate in 1974, he has waited an inordinate amount of time for any return on his effort.[8]
The Court accordingly finds that $65/hour is a reasonable average rate for Mr. Mitchell's services.

Mr. Mitchell also requests reimbursement for time expended by persons other than himself whose credentials and, in some instances, identity are not supplied. With one exception, the Court has treated these persons as law clerks and has allowed their time at $5/hour. The Court is well acquainted with Mr. Don Fleming from other matters before the Court, however, and has always found him to be a diligent and capable attorney. Mr. Fleming's time is accordingly allowed at the requested $40/hour rate.

10. Walker, Hollingsworth & Jones (formerly Walker, Kaplan & Mays). The Court is firmly of the opinion that Mr. Walker's firm was needlessly associated. Although the Court does not question their ability, their contribution to class issues was minimal. They should, however, be compensated for any non-duplicative work performed that was of benefit to the class.

Mr. Walker is a distinguished civil rights attorney whose experience in major class litigation approaches that of Mr. Specter. Walker attended the class certification hearing and was requested by lead counsel to prepare a portion of the post-hearing brief. The

[8]Of the expenses due Mr. Mitchell, $7,500.00 represents a conditional grant from the Women's Law Center to be repaid as a loan in the event the class or the named plaintiffs prevailed in the suit. The out-of-pocket expenses actually carried by Mr. Mitchell amount to $2,678.82. The Court does not consider this an extraordinary burden.

Court finds that this effort was reasonable and necessary and that $70/hour is a reasonable rate for these services.

Mr. Kaplan's experience in civil rights litigation is considerable but not as extensive as that of Mr. Walker. Kaplan helped review and draft the pleadings upon which the class allegations were based. The Court finds that $60/hour is a reasonable rate for these services.

The Court finds that $50/hour is a reasonable rate for Mr. Jones' services. Mr. Jones is experienced in civil rights litigation but his role, much like that of Mr. Molberg, has been peripheral. His time on class matters was confined to 1978 and consisted primarily of his attendance at the Pittsburgh and Los Angeles strategy meetings.

11. Legal Assistants. With the exception of Mr. Specter, counsel submitting fee petitions have used the term "legal assistants" to describe all employees other than licensed attorneys who performed services on anything resembling a project basis. Reimbursement is requested at the rate of $25/hour for time expended by law clerks, paralegals, secretaries, and in one instance a photographer. The services performed included legal research, administrative tasks, copying, filing, deliveries, etc. The Court is convinced that $25/hour for any of these employees incorporates a profit margin on services that should be provided at cost. The Court is further convinced that law students are not necessarily qualified to do the work for which a certified paralegal has been trained, and vice versa. Research performed by law students is accordingly allowed at $5/hour. Administrative work performed by certified paralegal Elain Blatter is allowed at $20/hour; similar work performed by the other "paralegals" whose credentials have not been provided to the Court is allowed at $10/hour. Mr. Craig's photographer has been charged at $10/hour. Extraordinary clerical time, i.e., time in excess of one hour per project, has been allowed at $5/hour for copying and deliveries performed by Mr. Craig's employees.

12. Multipliers and Interest. The appointment of lead counsel

marks a turning point in the case. Since the entry of that order on April 19, 1977, the action has proceeded in an orderly and purposeful way. The Court, however, has taken adequate account of efficiency in determining the attorneys' hourly rates and declines the additional use of a multiplier. Since no attorney's fee is due under a contingent fee arrangement until the case is concluded, at least in the trial court, no pre-judgment interest is appropriate. *See, Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316, 1321-1323 (5th Cir. 1978); *Gates v. Collier*, 616 F.2d 1268, 1280 (5th Cir. 1980) *per curiam on petition for rehearing*, No. 79 1844, slip op. 3041 (decided January 7, 1981).

C. Total Fees and Expenses.

In deciding whether to accept a case on a contingent fee basis, a plaintiff's attorney makes a highly subjective calculation of potential recovery less the amount of time and expense likely required to achieve it. Being limited to a percentage of the ultimate recovery, however, the attorney takes the risk that the award will not prove large enough to justify the time he has devoted to it - a risk he cannot unilaterally shift to the client. Even when it becomes apparent during the course of the suit that the probable recovery will not be profitable to the attorney, professional responsibility demands that the attorney accede to his client's wishes not to settle and see the matter through to its conclusion. The attorney may, of course, forfeit his right to share in the recovery or attempt to renegotiate his fee.

A new type of fee arrangement has developed with the advent of statutory attorney's fee awards. If the fees are imposed on the defendant over and above the plaintiff's recovery, the likelihood of a Phyrric victory for the attorney is greatly reduced. In the context of a class settlement, however, where fees are customarily deducted from a finite fund, it is the Court's responsibility to see that a just portion of the recovery goes to the class in the absence of a percentage limitation to allocate the risk of a disappointing recovery between the attorney and the client-class. Thus, independent of the reasonableness of the hourly rates, hours, and

expenses the Court must determine whether the resultant fee is commensurate with the benefit inuring to the class.

The Court finds that the charges for professional and paraprofessional time amount to $345,094.50 which is approximately 25% of the settlement fund. Time plus total expenses of $157,693.15 is 36.8% of the fund. In light of the quality of the attorney's work and the fact that 25% - 33% of the monetary recovery plus out-of-pocket expenses is the accepted and ordinary contingent fee where the case is settled before trial, the Court concludes that $502,787.65 is a reasonable attorney's fee.

II. Fairness of Settlement Proposal.

On March 3, 1980, defendant Bell deposited $1,125,000 in an interest bearing account to be distributed to the class with all accrued interest as soon as the settlement was approved. At this time the settlement fund totals approximately $1,366,000.00. An award of $502,787.65 in attorney's fees would leave in round figures $863,000.00 available for distribution. Under the allocation formula set out in the settlement proposal,[9] each unhired applicant would receive approximately $94.00 from the fund; each present or former employee would receive $8.63 per month worked during the time periods established for the respective subclasses, or a maximum of $760.00 for blacks and $664.00 for white females.

The Court holds that this is a fair and reasonable settlement, considering both monetary award and the affirmative relief. In

[9]Under the settlement, 85% of the fund remaining after fees and expenses is allocated to the class of present or former employees with individual awards to be based upon the following formula:

$$\frac{\#\text{ months worked by employee/claimant}}{\Sigma\ \#\text{ months worked by all employee/claimants}} \times \text{85\% of settlement fund after payment of fees and expenses}$$

The remaining 15% of the fund after fees and expenses will be divided equally among the unhired applicant class members who have filed claims as of the date of this opinion.

support of this holding, the Court summarizes the procedural history of the action and makes the following findings of fact and conclusions of law:

A. Procedural Summary of Case.

The first of these consolidated employment discrimination suits was filed on March 5, 1975, styled *Sarah Linda Parker, et al. v. Bell Helicopter Co.*, CA 4-75-61-E. Other actions by Bell employees were subsequently filed containing identical class allegations and differing only in the identity of the plaintiff(s) and the factual circumstances of their individual experiences at Bell. The actions filed by plaintiffs Parker, Ford, Jackson, Haynes, Eberly and Randall also contained charges of race and sex discrimination allegedly practiced by the Unions of which they were members. On April 21, 1978, the court conditionally certified a broad class of all blacks who were employed by or applied for work at any Texas facility of Bell Helicopter after November 29, 1972, as well as a class of all females who were employed by or applied for work at any Texas facility of Bell Helicopter after November 2, 1973. The Court denied certification of a class against the Unions but kept them in the suit as parties on the individual claims and as an active participant at the remedy stge in the event liability was established against Bell. The individual claims against the Unions were ultimately severed for separate trial and are still pending on the Court's docket.[10]

The case was originally set for trial for the week of July 25, 1977. This setting was vacated pending certification of the class, and a new schedule was entered setting trial for the week of September 10, 1979. Although an energetic program of discovery was conducted throughout 1977 and 1978, plaintiffs sought and obtained discovery of the veritable mother lode of Title VII proof in the months immediately preceding the 1979 setting. Plaintiffs obtained the computer tapes that recorded the entire past and

[10]See Order entered February 14, 1980.

present employee skills bank maintained by defendant Bell for its Texas facilities, portions of the affirmative action plans filed by Bell with the Department of Labor for contract compliance purposes, as well as a highly-confidential compensation analysis of non-union positions at Bell performed by an independent consulting firm (the "Hays Study"). In order to permit adequate analysis of this data, the trial date was continued to March 1, 1980, with a pre-trial conference scheduled for February 2, 1980.

Although trial of the case had been bifurcated into a liability stage and a remedy stage at the time the class was certified, the Court solicited the parties' preliminary opinions at the February 2nd pre-trial conference regarding further division of the liability stage into class and individual claims. Counsel estimated that trial of the entire liability case would take approximately six weeks and that trial of class liability issues alone would require at least two weeks. The Court took the bifurcation issue under advisement and urged the attorneys to make a good faith attempt to settle the case before resorting to a lengthy, expensive, and uncertain trial.

On February 29, 1980, counsel filed a joint motion for continuance representing to the Court that negotiations between lead counsel for the respective parties had produced a tentative settlement agreement but that additional time would be required to negotiate the details and resolve the individual plaintiffs' claims. The Court granted the continuance and instructed counsel to inform the Court no later than April 1, 1980, whether a complete settlement could be reached. On March 28, 1980, all counsel entered into a binding settlement that left the plaintiffs' individual claims to be resolved independently. This document was filed on April 18, 1980, attached to the joint motion for preliminary approval.

On April 10, 1980, several of the named plaintiffs moved to substitute civil rights attorney Charles Padorr as their counsel of record for the purpose of objecting to the settlement. On May 29, 1980, the Court defined a subclass of "objectors" and appointed Mr. Padorr as lead counsel for that subclass with authority to conduct discovery into the propriety of the negotiations and the fair-

ness of the settlement terms. By June 21, 1980, all of the named plaintiffs except Judith Anderson had dismissed their former attorneys and announced their opposition to the settlement. All of these plaintiff-objectors were represented by Mr. Padorr either by virtue of the May 29 order or their respective motions to substitute, with the possible exception of plaintiffs Mackey and Odom.[11] Judith Anderson continued to be represented by Mr. Mitchell. A hearing on the fairness of the settlement and reasonable attorney's fees was set for August 7, 1980, then continued to October 16, 1980.

With Mr. Padorr's adversarial participation, a notice of proposed settlement was drafted by the Court and approved on August 25, 1980. A copy of the notice and claim form mailed to class members and a copy of the verbatim publication notice are contaied in Attachment B. Claim forms, comments, and other correspondence from the notified class were directed to a post office box held in the name of the District Clerk. To protect the privacy of absent class members and assuage any fear of retaliation by Bell or the named plaintiffs, access to this correspondence was limited to counsel of record and their clerical assistants. Representatives of the parties opened the accumulated mail periodically. Defendant's counsel were instructed to prepare a report of the results, updated as of October 15, 1980, for use in calculating the potential individual awards.

The settlement hearing was held on October 16, 1980, as scheduled. The Court heard testimony for two days on the nature of the negotiations and the fairness of the settlement terms. Part of a third day was required to hear the issue of attorney's fees. All parties were given the opportunity to file post-hearing briefs on a schedule established by the Court. All briefs and replies having been received, the Court has carefully examined the settlement,

[11] These plaintiffs adopted an equivocal position that was never resolved for the Court or Mr. Padorr. While apparently looking to Mr. Padorr for legal guidance and acquiescing in his spokesmanship and advocacy, Mackey and Odom insisted that they had never formally retained him. Mackey and Odom were, therefore, added to the roster of attorneys as pro se plaintiffs.

the fee petitions, and the testimony presented at the hearing and makes the following findings of fact and conclusions of law.

B. Findings of Fact.

1. The notice of proposed settlement mailed or otherwise distributed to class members provided a materially complete and comprehensible description of the settlement terms and permitted an objective assessment of the benefits to be received in return for release of any covered discrimination claims. The range of attorney's fees and the resulting estimated value of a distribution unit suggested in the Notice proved to be an accurate prediction of the award that could be expected by a member of the employee class. Although an accurate estimate of attorney's fees did not significantly narrow the range of awards that could be expected by an unhired applicant, a high degree of uncertainty is inherent in awards to any large class of persons who can only be notified by publication. By describing the variables and leaving the unhired applicant to perform his own simple computations, the Notice provided the best estimates possible under the circumstances without distorting either the amount of the award or its predictability.

2. Absent class members had an adequate opportunity to examine the settlement critically and present their objections. They were put on notice that some of the named plaintiffs objected to the settlement and that they were also entitled to object. They the opposing positions. Class members were permitted to abide with the attorneys already in the case or to appear on their own behalf, with or without an attorney.

3. Actual notice was given to all absent class members whose names and last known addresses could be ascertained with reasonable effort.

4. The Court finds that notice by publication was the best notice practicable to the unhired applicants for whom names and reasonably current addresses could not be easily ascertained. The Court further finds that notices published on two occasions, two weeks

apart, in four newspapers of general circulation in the locales from which defendant Bell drew its workforce, were reasonably calculated to reach the unhired applicant class.

5. The initial mailing of the notice was completed on September 3, 1980. The notice was first published on September 1, 1980, and was published for a second time two weeks later.

6. Whatever the motives of the named plaintiff-objectors, their opposition to the settlement created an adversarial setting in which to weight the legitimate interest of the objecting class. The objecting class was represented by an able attorney who was afforded the means to raise and adequately develop his position on the adequacy of a settlement negotiated prior to any determination of liability.

7. Prior to September 1979, lead counsel Specter estimated defendant Bell's maximum exposure for back pay claims at thirteen million dollars, assuming plaintiffs succeeded in proving all of their factual allegations at trial and the Court accepted the formulas for estimating back pay most favorable to the class. Five million dollars was the conservative estimate, assuming compplete success on all factual issues but adoption of a less favorable formula for estimating back pay. In 1978, Specter made an offer of $5,000,000.00 in cash and affirmative relief, which offer was rejected by defendant Bell.

8. In late 1979, the named plaintiffs and their counsel were all justifiably confident of the strength of their case. Discovery had yielded a wealth of reliable data for use by plaintiffs' experts in sketching the statistical outlines of minority experience at Bell. At that time, lead counsel Specter placed the probable value of the case at $5,000,000.00. The result of the expert's analysis that became available in early 1980, however, did not support such high expectations. The dramatic statistical patterns of underutilization upon which a strong case for systematic discrimination is necessarily built simply did not emerge. In the face of Dr. Mann's characterization of the data as "not a particularly strong plaintiffs' case," lead counsel revised his estimation of probable recovery downward and continued to prepare for trial. Upon the Court's

urging at the pre-trial conference, Specter instituted earnest settlement negotiations with counsel for Bell that continued until the Friday before the trial was scheduled to begin.

9. The negotiations that resulted in the proposed settlement were begun after exceptionally thorough discovery of class issues had been completed. Negotiations were at arms length between mature attorneys of the highest ethical caliber, having access to virtually identical raw data. There is simply no rebuttal evidence of any weight to suggest that either attorney agreed to a settlement figure or settlement terms that were at variance with his bona fide professional judgment as to the strengths and weaknesses of his case, the expense of trial, and the likelihood of protracted appeals.

10. Trial of class liability issues alone could reasonably have been expected to add another $80,000.00 in attorney's fees and expenses to that already accrued by plaintiffs on March 1, 1980, with only a marginal chance of a recovery in the five million dollar range previously estimated by plaintiffs' lead counsel. In light of the expected rebuttal testimony from defendant's statisticians, there was a significant risk of failing to show liability on the major back pay issues.

11. If plaintiffs simply failed to persuade the trier of fact on the question of liability, there would be little hope of a reversal on appeal given the clearly erroneous standard for review of factual findings. On the other hand, if plaintiffs obtained a back pay award of three to five million dollars for the class, defendant Bell could be expected to appeal on a variety of legal issues, e.g., the propriety of certifying a class that included unhired applicants and/or the Amarillo facility, the necessity of showing discriminatory intent on Title VII claims not based on adverse impact, the Court's measure of damages, the validity of causes of action based on affirmative action plans, etc.

12. Counsel, with the assistance of expert statisticians, were in a far better position to judge the strengths and weaknesses of the class case against Bell than were the name plaintiffs or the absent class members.

13. The correspondence and the attorneys' fee petitions show that counsel consulted regularly and frequently with the class representatives throughout the case. Although the settlement negotiations that ensued following the February 1980 pre-trial conference and resulted in the tentative settlement on February 28, 1980, were conducted entirely between lead counsel for defendant and lead counsel for plaintiffs, all attorneys and a number of the named plaintiffs were aware that settlement negotiations were actually underway.

14. Associate counsel for plaintiffs were aware prior to March 1, 1980, of the serious evidentiary problems that afflicted the case. On February 29, 1980, lead counsel Specter drafted a letter to Mr. Stephen Shulman, counsel for defendant Bell, confirming their mutual understanding of the tentative settlement proposal. This letter was circulated to associate counsel for discussion with the named plaintiffs. During the early weeks of March, all named plaintiffs consulted their attorneys about the class settlement and authorized them to convey binding settlement offers to defendant Bell and to approve the class settlement on their behalf if accepted. In late March, defendant Bell rejected the plaintiffs' offers of settlement and extended modest counteroffers. Upon receiving a letter from Specter on March 26, 1980, describing Bell's counteroffer, plaintiff Mackey hastily called a meeting of the named plaintiffs for that evening, at which associate counsel Jim Barber agreed to appear. Angry and offended at what seemed to them small counteroffers, and fortified with a case of beer, the plaintiffs were ill disposed to listen to any explanation of the deficiencies of the statistical case against Bell. Posturing and wild talk took the place of reasoned analysis. At the close of the meeting, the plaintiffs voted to "reject" the settlement.

15. On or about March 28, 1980, defendant Bell agreed to waive its right to withdraw from the tentative settlement in the absence of binding settlements with the plaintiffs on their individual claims. Despite the vote taken two days before, two of the named plaintiffs, Dorothy Spears and Judith Anderson, had subsequently indicated their support of the settlement. On March 28, 1980, all counsel

signed the final Stipulation of Compromise and Settlement, subject only to approval by the Court.

16. The dominant theme of the discussions between named plaintiffs and their former attorneys from March 1, 1980, to April 10, 1980, was the inadequacy of the individual settlement offers made to the plaintiffs rather than the merits of the class settlement.

17. The named plaintiffs did not learn of the four year term of the Stipulation until after they had resolved to object to the settlement. The four year term, therefore, played no part in their decision to object.

18. Associate counsel had an adequate opportunity to examine the settlement terms criticlly on behalf of their clients and any potential subclasses prior to their signing the Stipulation of Compromise and Settlement on March 28, 1980.

19. Plaintiffs Mackey and Odom did not support their petition for fees and expenses with affidavits and contemporary time records as required by the Court's orders. The Court considers this a minor point however, in light of their sworn testimony at the settlement hearing. Even assuming that plaintiffs were entitled to recover for their time and personal, out-of-pocket expenses, it is apparent that some of the items listed in the petition were not actually expended by either Mackey or Odom and many of the dollar amounts given were no more than a speculative value assigned by these plaintiffs to the interest they had taken in the case.

20. Plaintiff-objectors opposed the settlement in bad faith, primarily to gain leverage in settling their individual claims against Bell at exorbitant figures. Although there were obvious difference of degree among the plaintiff-objectors, their opposition to the settlement was a product of disappointment and greed rather than a dispassionate evaluation of the settlement against the risks and expense of pressing on with the litigation.

21. For purposes of examining objections, the class may be broken down by facility into the following categories: (1) unhired applicants; (2) former employees; and (3) employees as

of March 1, 1980. There were an estimated 20,000 unhired applicants connected with the Fort Worth area facilities of which 1,330 responded by filing claims on or before March 2, 1981. There were approximately 10,000 unhired applicants connected with the Amarillo facility of which 50 responded. In the former employee category, 272 class members from the Fort Worth area and 98 from Amarillo responded. There were 1,187 class members employed in Fort Worth area facilities on March 1, 1980, and 319 in Amarillo.

Following a rather strenuous campaign by the named plaintiff-objectors to enlist dissenters from Bell's Fort Worth area employees, 242 objections were received representing about 20% of that segment of the employee class still working in the Fort Worth facilities on and after March 1, 1980. Sixty-two (62) former employees of Fort Worth area facilities, representing 23% of those responding, also objected. All but 12 of these objections, including those of former employees, were in the form of preprinted petitions circulated by the plaintiff-objects personally. Only one class member from Amarillo - a former employee - filed an objection. None of the 1,380 total unhired applicants filing claims identified themselves with the objectors.

The objections were directed entirely to the size of the settlement fund and the absence of job preferences, seniority rights and training programs in the affirmative relief. No objections from the class or from the plaintiff-objectors at the settlement hearing raised the allocation formula as an attack on the fairness of the settlement.

The Court finds that 20% - 23% is a significant, if not overwhelming, proportion of the employee class. However, the bulk of these objections were obviously prompted by contacts with the plaintiff-objectors. The handbill distributed at the gates of the Fort Worth area facilities (see affidavit of Howard Lowe filed October 10, 1980) is probably a conservative statement of the plaintiff-ojectors' position. Although it does not contain an egregious distortion of the monetary recovery that might be expected by an individual class member, its tone is decidely partisan and it omits

any reference to the expense of trial, to the possibility of a take nothing judgment, or to any of the factors relevant to a reasoned assessment. Since no rejoinder was undertaken by proponents and since none of the absent class members were in a position to assess the strengths and weaknesses of the statistical case against Bell independent of the plaintiff-objectors' militant portrayal, the Court is of the opinion that the objections are only as valid as the plaintiff-objectors' assertions.

22. Throughout this action plaintiffs' principal charge of adverse impact has been lodged against the educational and experience requirements contained within defendant's job specifications. Plaintiffs contend that these are unnecessary barriers to hiring and promotion of blacks and women. Defendant counters that blacks and women are not adversely affected to a significant degree and that, regardless of adverse impact, the technical nature of the industry justifies such qualifications. The Court finds that these issues would have been hotly disputed at trial with sharply conflicting testimony from statistical experts drawing their opinions from the same basic data and seeking to impeach their opponents' analyses to their own purposes. Defendant Bell was also prepared to offer extensive expert testimony on the demands and standards of the aircraft and defense industry.[12] The settlement allows the parties to avoid an all-or-nothing confrontation of unpredictable outcome by submitting the question of validity to expert consultants, selected by agreement between counsel, rather than to the Court. The recommended job specifications would then be submitted to the defendant Unions for approval. Even though it is conceivable that the Unions would reject the recommendations in favor of maintaining invalid requirements, the Court finds this a remote possibility given the evidentiary value such an act would

[12]In December 1979, the Court accompanied counsel for the parties on a tour of Bell's Fort Worth area facilities. Without deciding the issue the Court will note its observation that the construction of aircraft is more technical and requires a higher degree of skill and knowledge than ordinary assembly-line work.

have in any present or future litigation against these Unions.[13] Furthermore, defendant Bell would be risking almost certain liability for discrimination since March 1, 1980, if, having the power, it failed to amend job requirements shown to be invalid by the consultant's report.

23. Defendant Bell had a thorough compensation analysis of its non-union positions performed by an independent consultant in 1979 (the Hays Study). The Stipulation clearly requires Bell to adopt an ongoing policy extending beyond the four year term of the contract itself under which the company will review the validity of job specification for all positions at three year intervals for the express purpose of amending those specifications if they are found to be invalid. The results of the first such review will be provided to lead counsel Specter. The results of subsequent triennial reviews would be available to any aggrieved person by way of discovery.

24. Plaintiffs were prepared to show at trial that various programs held out by defendant Bell as examples of its equal employment efforts were, in fact, mere windowdressing; that they were never fully operative and were neither publicized nor conscientiously utilized by defendent. Plaintiffs alleged and expected to prove the following facts in support of their position that defendant Bell was indifferent to and intent upon evading its equal employment obligations: (1) that recruitment was intermittant, perfunctory and limited to a few trade schools and colleges, especially at Amarillo; (2) that minorities and females were not informed of or encouraged to complete the Employee Skills Profile Questionnaire, that no consistent effort was made to keep the information current, and that managerial and supervisory personnel with hiring authority were not instructed or required to consult the Employee

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[13]The individual actions against the Unions brought by a number of the named plaintiffs are still pending. Discovery in these actions is far from complete and it is not yet clear whether any of the attorneys originally engaged to prosecute the suit will continue to represent the plaintiffs. The Court estimates that these actions will not be ready for trial before the consultant's recommendations have been presented to the defendant Unions for approval.

Skills Profiles and, in fact, did not do so; (3) that the personnel in charge of affirmative action and/or equal employment opportunity were supernumaries with no real authority and with virtually no input at upper management levels; (4) that management has not made compliance with equal employment goals a positive criteria in evaluating the performance of its supervisory personnel; (5) that management makes no significant effort to determine when, whether and how discrimination is taking place or to emphasize equal employment goals to its supervisors. The Court finds that each provision for affirmative relief described in the Stipulation is responsive to one or more of the complaints enumerated above.

25. The Court finds that the position of Equal Opportunity Coordinator will be expanded and upgraded under the settlement to provide better access to upper-level management and better implementation of defendant's affirmative action plans. The new coordinator will maintain a skills pool of identifiable blacks and women to be reviewed periodically and consulted as a matter of course for hiring and promotion purposes.

26. The Court is of the opinion that the following techniques provided in the Stipulation are basic to non-discriminatory utilization of qualified minorities and women in the face of subjective prejudice at the supervisory level: (1) requiring written reasons for rejecting black and female applicants and/or candidates for promotion; (2) maintaining a list of currently available supervisory jobs; (3) employing properly trained interviewers and recruiting personnel; (4) required participation by all supervisors in a training program to acquaint them with equal opportunity goals, the operative procedures for meeting those goals, and the supervisor's responsibility for serving them; (5) maintenance of records and periodic reports to an officer with policymaking authority.

27. The Court agrees with plaintiff-objectors that the Stipulation does not provide for the following relief: (1) specific action upon the quarterly report made by the EEO Coordinator; (2) informing rejected applicants or candidates for promotion of the reasons for their rejection; (3) specific adverse personnel action against supervisors with poor evaluations in the equal employment

area; (4) posting of the list of available supervisory positions on bulletin boards in work areas; (5) maintenance of a list of currently available managerial positions; (6) hiring quotas, promotional preferences, or training programs for blacks and women desiring to enter supervisory or managerial positions; (7) written reasons for adverse personnel actions other than refusal to hire or promote; and (8) validation of tests or lines of progression.

28. Contrary to plaintiff-objectors' contention, the Court finds that the Stipulation does provide for review as a matter of course of the applications and Employee Skills Profile Questionnaire maintained by the EEO Coordinator for the purpose of referring qualified blacks and females for consideration along with other applicants for employment and/or promotion. The Court further finds that the Stipulation requires corrective action if recruiting and interviewing personnel are discovered to be unqualified or lacking in training.

29. The Court finds that the affirmative relief described in the Stipulation will cost approximately $1,000,000.00 to implement and maintain and will be of substantial value to the class.

30. The Court finds that the cost of compliance with the affirmative action provisions of the settlement plus the amount remaining for distribution after deduction of attorneys' fees and expenses yields a net settlement value of $1,863,000.00. In light of the strengths and weaknesses of plaintiffs' case, the expense of trial and the likelihood of protracted appeals, the Court finds that this is a fair, reasonable, and adequate settlement.

C. Conclusions of Law.

1. Settlement is the preferred method of resolving class litigation based upon employment discrimination. *Miller v. Republic National Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977); *Pearson v. Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975). Nevertheless, because of the fact that a class settlement is negotiated in the absence, and often without the knowledge, of most of the individuals whose rights are being compromised, Rule

23(e) requires court approval of the settlement and prescribes certain procedural protections for the absent class members, including notice under the standards of *Mullane v. Hanover Bank & Trust Co.*, 33 U.S. 306 (1950), 70 S.Ct. 652 (1950) and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140 (1974) and an opportunity to object prior to approval. In the final analysis, the Court acts as a fiduciary to the absent class members and must examine each settlement thoroughly and critically to determine whether it is fair and reasonable to each distinct segment of the class. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1169 (5th Cir. 1978) [hereinafter *"Pettway IV"*]; *Piambino v. Bailey*, 610 F.2d 1306, 1327-1329 (5th Cir. 1980).

2. The notice must contain a description of the class and a fair and neutral recital of the terms of the settlement; must notify class members of their right to object, and must give them a reasonable time in which to do so. *Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1975); *Oswald v. McGarr*, 620 F.2d 1190 (7th Cir. 1980); *Miller v. Republic National Life Ins. Co.*, 559 F.2d 426 (5th Cir. 1977). Where attorneys fees are to be fixed by the Court, the notice must advise the class of that fact and provide an estimate of the proposed fees. *Piambino*, 610 F.2d at 1328.

3. Where the monetary award to individual class members is subject to a number of variables that can themselves only be estimated, the better practice is to provide a description of the variables and the formula for calculating the awards rather than giving a speculative dollar figure. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977).

4. The class was given a reasonable time in which to object to the terms of the settlement. *Miller*, 559 F.2d at 429-430.

5. The Court concludes that notice was adequate in all respects.

6. Where class representatives find themselves divided over the settlement or unnamed plaintiffs appear and seek to oppose the compromise put forward by the representative, the opponents should be permitted the opportunity to adequately develop the

basis for their opposition by obtaining separate counsel, conducting discovery, and presenting their position in an evidentiary hearing, if desired. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2nd Cir. 1974); *Saylor v. Lindsley*, 456 F.2d 896, 901 (2nd Cir. 1972); *Pettway IV*, 576 F.2d at 1169. Although the scope and manner of any such discovery may be limited to prevent undue expense, abuse of the defendant, or betrayal of the plaintiffs' case, *see Grinnell*, 495 F.2d at 463-464, matters deemed relevant should include the conduct of the settlement negotiations, the areas of potential conflict of interest between the class and its representative or counsel, and the extent and nature of the data upon which the proponents relied in arriving at the settlement.

7. The threshold inquiry is whether there is a sufficient basis in the record to form an educated opinion. Where settlement is reached on the eve of trial after years of active litigation in which a voluminous file has accumulated and comprehensive discovery has been completed, there will usually be an adequate basis for the "balancing of likelihoods" that the court must undertake. *Levin v. Mississippi River Corporation*, 59 F.R.D. 353, 361 (S.D.N.Y. 1973) *aff'd sub nom. Wesson v. Levin*, 486 F.2d 1398, *cert. denied* 414 U.S. 1112, 94 S.Ct. 843 (1973); *Flinn v. FMC Corporation*, 528 F.2d 1169, 1173 (4th Cir. 1975); *Saylor v. Lindsley*, 456 F.2d 896, 901 (2nd Cir. 1972). In this case, the Court also had the advantage of an organized and capably represented group of objectors who, if they did not succeed in impugning the settlement, at least left little reason to suspect material gaps in the record.

8. In determining whether the settlement is fair and reasonable, the Court is neither required nor permitted to adjudicate ultimate issues of fact and law since the very purpose of the settlement is to avoid a trial. *Grinnell*, 495 F.2d at 462; *Greenspun v. Bogan*, 492 F.2d 375, 381 (1st Cir. 1974); *Pettway IV*, 576 F.2d at 1214. What the Court must do is assess the business judgment reflected in the settlement. *Protective Committee v. Anderson*, 390 U.S. 414, 88 S.Ct. 1157 (1968); *Young v. Katz*, 447 F.2d 431, 433

(5th Cir. 1971). In making that appraisal, the Court should consider (1) whether the settlement was a product of fraud or collusion; (2) the complexity, expense and likely duration of litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles to prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinions of the participants, including class counsel, class representatives, and the absent class members. *Girsh v. Jepson*, 521 F.2d 153 (3rd Cir. 1975); *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977); *Pettway IV*, 576 F.2d at 1214-1219. In the absence of fraud or collusion, the most important of the above criteria is the probability of successon the merits. *Flinn v. FMC Corporation*, 528 F.2d 1169, 1172 (4th Cir. 1975); *Grunin v. International House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975); *Grinnell*, 495 F.2d at 455.

9. The expert opinion of experienced counsel who have conducted full discovery into the facts and are familiar with the requisites of proof in a court of law is entitled to great weight in determining the adequacy of a settlement, absent a showing that counsel's judgment was clouded in some material way. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Pettway IV*, 576 F.2d at 1215; *Saylor v. Lindsley*, 456 F.2d at 900-901. Lead counsel's credentials, his exemplary conduct before this Court, and the concurrency of all former counsel for plaintiffs generally recommends his assessment. More importantly, however, his evaluation is consistent with the file, with the course of discovery, and with the statistical analyses of plaintiffs' own expert. Although counsel for objectors was given access to the fruits of all previous discovery, filed and unfiled, as well as all work product shown to defendant Bell during the negotiations, objectors adduced no persuasive evidence to show fraud or collusion or to otherwise impeach counsel's evaluation of the settlement given the weaknesses of the case.

10. The professional obligations of lead counsel for the class to the class representative constitute a hybrid of the ordinary attor-

ney-client relationship. The nature of this relationship and the appropriate way of handling a serious difference of opinion between counsel and the representative over the interests of the class has been cogently summarized by the eminent Judge Friendly writing for the court in *Saylor v. Lindsley,* 456 F.2d at 901:

> We are willing to go along with the appellees and hold, despite the seeming incongruity, that the assent of the plaintiff (or plaintiffs) who brought a derivative stockholder's action is not essential to a settlement; a contrary view would put too much power in a wishful thinker or a spite monger to thwart a result that is in the best interest of the [class]. On the other hand. . . we are not willing to go to the other extreme and accept the view that the attorney for the plaintiff is the *dominus litus* and the plaintiff only a key to the courthouse door dispensable once entry has been effected. The attorney remains bound to keep his client fully informed of settlement negotiations, to advise the client before signing a stipulation of settlement on his behalf, and, if the client has objected, to inform the Court of this when presenting the settlement, so that it may devise procedures whereby the plaintiff, with a new attorney, may himself conduct further inquiry if so advised.

The Court of Appeals for the Fifth Circuit has adopted this view which essentially requires the Court upon being notified of a conflict to reassure itself of the continuing adequacy of the representative before bowing to the traditional allocation of authority that would obtain between an attorney and his individual client under the Code of Professional Responsibility. *Pettway IV,* 576 F.2d at 1176-1178; *Kincaid v. General Fire & Rubber Co.,* 635 F.2d 501, 508 (5th Cir. 1981).

11. The Court concludes that lead counsel behaved appropriately in negotiating the tenative settlement as spokesman for the class, immediately advising the named plaintiffs and associate counsel of its terms by letter, and ascertaining the named plaintiffs'

reaction to the settlement before presenting it to the Court by their Joint Motion for Preliminary Approval on April 18, 1980. It would be a gross distortion of the events to suggest that counsel attempted to conceal or even delayed notifying the Court of the plaintiff-objectors' dissent once it became irreconcilable.

12. Plaintiff-objectors misconstrue *Pettway IV* in citing it for the proposition that all settlements, regardless of the stage in the litigation at which they are reached, must allow class members to reject their share of the settlement and attempt to prove a greater amount of individual damages in a later proceedings. In *Pettway III,* 494 F.2d 211 (5th Cir. 1974), the trial court's finding of liability against the defendant had been affirmed, but the denial of back pay had been reversed and remanded with detailed instructions regarding the calculation of pay back awards. 949 F.2d at 260-264. The court then suggested the following method of determining and allocating class-wide back pay as an alternative to making a multitude of individual calculations:

> In other words, the total award for the entire class would be determined. At that point individual claims would be calculated on pro rata shares for those workers of similar ability and seniority claiming the same position, possibly eliminating the necessity of deciding which one of many employees would have obtained the position but for the discrimination. Claimants dissatisfied with their portion of the award could be allowed to opt out in order to prove that they were entitled to a larger portion.

494 F.2d at 263, n. 154. The back pay judgment entered by the district court in response to the mandate of *Pettway III,* however, required certain class members either to cash their back pay checks and thereby release the defendant from all future liability or to opt out of the litigation altogether and bring new lawsuits to collect their back pay. In *Pettway IV,* the Fifth Circuit found that this procedure put dissenting class members in an untenable predicament and held that they could not be required to opt out of the

litigation but must be afforded the opportunity to prove larger damages, if at all, within the same proceeding. 576 F.2d at 1219-1222. This holding is inextricably bound up in the lengthy procedural history of *Pettway* and cannot be read as a general requirement applicable to settlements reached before any determination of liability. *Kincaid v. General Fire & Rubber Co.*, 635 F.2d 501, 507 n. 10 (5th Cir. 1981).

13. Although neither absent class members nor the class representatives have an absolute right to opt out of a settlement to which they object, a settlement that allows the named plaintiffs to pursue their individual claims separately may be approved as fair and reasonable under the proper circumstances. *Kincaid*, 635 F.2d at 506-508; *Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981). Of course, any provision that accords different treatment to the representatives than to the class must be examined closely to guard against bartering of the class interests in return for a premium. *See, Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973); *Sagers v. Yellow Freight Systems, Inc.*, 68 F.R.D.686(N.D.Ga. 1975) *aff'd.* 529 F.2d 721 (5th Cir. 1976); *Women's Committee for Equal Employment Opportunity v. National Broadcasting Co.*, 76 F.R.D.173, 181-182 (S.D.N.Y 1977). Since the absent class members make no financial contribution to the litigation and bear none of the risks or personal discomfiture involved in openly suing one's employer, the named representatives can reasonably be allowed to prove greater damages so long as the special provision does not cast doubts upon their adequacy and is not at the direct expense of the other victims of discrimination, especially where liability has already been established. *See, e.g., Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 64 (5th Cir. 1974); *Bray v. Lee*, 337 F.Supp. 934 (D. Mass. 1972). The plaintiff-objectors' vehement opposition to the settlement obviates much of the Court's fiduciary concern that the representative may acquiesce in an unfair or inadequate settlement in return for preferential treatment. Nonetheless, the severance provision itself is designed to minimize any conflict with the class. The fund available for distribution to the class will not be

reduced by any monetary damages awarded to the named plaintiffs or by the expense of pursuing them. Unlike the absent class members, the named plaintiffs will be put to their proof before any recovery is had. Because of the nature of the affirmative relief provided in the Stipulation, no promotions won by the named plaintiffs will place them in direct competition with the absent class members. The Court, therefore, concludes that severance of the named plaintiffs' individual claims is not unfair to the class and does not affect the adequacy of the settlement. The Court further concludes that no general opt out provision is necessary to protect the interests of the absent class since they have been admirably represented by class counsel.

14. Although negotiations concerning the amount of an attorney's fee award might be allowed if damages have been approved and the fees are not to be deducted from the damage fund, *Prandini v. National Tea Company,* 557 F.2d 1015, 1021 (3rd Cir. 1977, negotiated fee settlements are disfavored as a rule, *Piambino v. Bailey,* 610 F.2d 1306 (5th Cir. 1980). Attorney's fees and expenses may properly be paid from the finite fund available to the class so long as the class is notified of the proposed fees and the amount is either determined by the Court or otherwise approved as reasonable under the *Johnson* criteria.

16. Despite their access to the file and to compulsory discovery, objectors adduced no evidence of any weight to rebut proponents' prima facie showing that the class case was not strong enough to demand larger monetary awards or additional affirmative relief. Nor did objectors introduce any persuasive evidence to show that the affirmative relief described in the Stipulation is identical or equivalent to programs already in existence at defendant Bell. After careful consideration of the file, the testimony and exhibits from the settlement hearing, the fee petitions, and the arguments of counsel, the Court concludes that proponents have met their burden of showing that the proposed settlement is fair and reasonable under the circumstances.

The settlement is accordingly APPROVED and the class claims against defendant Bell are hereby DISMISSED with

prejudice to refiling the same. Defendant is instructed to inform the Court by letter within 15 days after all checks have been mailed of the final calculation of individual awards, including (1) the total settlement fund distributed; (2) the total number of claimants in each category; and (3) the maximum award made in each category.

The severed individual claims shall remain consolidated until further order of this Court.

Signed this 10th day of March, 1981

ELDON B. MAHON

UNITED STATES DISTRICT JUDGE

LITMAN, LITMAN, HARRIS & SPECTER

Attorneys	# Hours	Rate	Fees	
H. Specter	1,480.0	$125/hr.	$185,000.00	
M. Buchwach	782.8	75/hr.	58,710.00	
B. Troiano	92.1	50/hr.	4,605.00	
D. MacCallum	93.4	40/hr.	3,736.00	
				$252,051.00
Paralegal				
E. Blatter	1,257.0	20/hr.	25,140.00	25,140.00
			Time	$277,191.00
			Expenses	134,854.56
			Total Fee	$412,045.56

LAW OFFICES OF JAMES C. BARBER

Attorneys	# Hours	Rate	Fees	
J. Barber	231.5	$ 85/hr.	$19,677.50	
K. Molberg	70.0	50/hr.	3,500.00	
S. Thorpe	74.0	65/hr.	4,810.00	
				$ 27,987.50
Law Clerks				
E. Thornberg	19.5	5/hr.	97.50	
S. Thorpe	10.0	5/hr.	50.00	14;7.50
			Time	$28,135.00
			Expenses	2,608.37
			Total Fee	$ 30,743.37

ATTACHMENT "A"

LAW OFFICES OF WALLACE CRAIG

Attorneys	# Hours	Rate	Fees	
W. Craig	146.9	$75/hr.	$11,017.50	
Legal Assistants				
B. Green	14.2	10/hr.	142.00	
L. McLeod	50.0	10/hr.	500.00	
J. Bentley	40.0	10/hr.	400.00	
J. Kelley	5.5	5/hr.	27.50	
M. Fischer	4.0	5/hr.	20.00	
				$ 1,089.50
Copying & Deliveries:	85.7 hrs. at $5/hr.			428.50
			Time	$12,535.50
			Expenses	$ 7,501.40
			Total Fee	$20,036.90

LAW OFFICES OF HUEY MITCHELL

Attorneys	# Hours	Rate	Fees	
H. Mitchell	319.8	$65/hr.	$20,787.00	
Don Fleming	24.5	40/hr.	980.00	
				$21,767.00
Legal Assistants:	42.7 hours at $5/hr.			213.50
			Time	$21,980.50
			Expenses	10,178.82
			Total Fee	$32,159.32

WALKER, HOLLINGSWORTH & JONES
(formerly Walker, Kaplan & Mays)

Attorneys	# Hours	Rate	Fees	
J. Walker	28.75	$70/hr.	$ 2,012.50	
P. Kaplan	14.00	60/hr.	840.00	
H. Jones	48.00	50/hr.	2,400.00	
				$ 5,252.50
Expenses:	Walker	$1,900.00		
	Kaplan	0.00		
	Jones	650.00		2,550.00
			Total Fee	$ 7,802.50

TOTAL TIME	$345,094.50	(25% of settlement fund)
TOTAL EXPENSES	157,693.15	
TOTAL FEES	$502,787.65	(36.8% of settlement fund)

ATTACHMENT "A" (cont'd)

APPENDIX C

"Order Amending Memorandum Opinion And Order Of March 10, 1981" of the United States District Court for the Northern District of Texas, Fort Worth Division

Dated April 10, 1981

SARAH LINDA PARKER, ET AL., Individually and on Behalf Of All Other Persons Similarly Situated	§	
VS.	§	CIVIL ACTION NO. CA4-75-61-E (Conditionally Consolidated)
BELL HELICOPTER COMPANY, A Subsidiary Division of TEXTRON, INC., ET AL	§	

ORDER AMENDING MEMORANDUM OPINION AND ORDER OF MARCH 10, 1981

On March 10, 1981, this Court entered its Memorandum Opinion and Order approving the Stipulation of Compromise and Settlement submitted on behalf of the class of plaintiffs described therein and defendants Bell Helicopter Company and Textron, Inc. The Court hereby AMENDS that Order in the following particulars:

I. Clerical Errors.

The first sentence under heading "II. *Fairness of Settlement Proposal.*" on page 13 of the Memorandum Opinion and Order is hereby amended to read as follows:

On March 3, 1980, defendant Bell deposited $1,250,000 in an interest bearing account to be distributed to the class with all accrued interest as soon as the settlement was approved.

The last sentence on page 15 of the Memorandum Opinion and Order, carrying over to page 16, is hereby amended to read as follows:

Plaintiffs obtained the computer tapes that recorded the entire past and present employee skills bank maintained by defendant Bell for its Texas facilities, portions of the affirmative action plans filed by Bell with the Department of Labor for contract compliance purposes, as well as certain data underlying a highly-confidential compensation analysis of non-union positions at Bell performed by an independent consulting firm (the "Hays Study").

II. Substantive Amendments.

A. Settlement Fund Plus Accrued Interest.

The Court arrived at an estimate of the fund available for distribution to the class and of the maximum awards that could be expected by individual class members using the figure of $1,366,000 as the minimum amount available for distribution as of the date of the opinion. The parties have now informed the Court that the settlement fund will actually be in excess of $1,440,000.00 at the time of distribution. Since this variance, if anything, enhances the Court's determination that the settlement is fair, adequate and reasonable to class members, amendments in the body of the Memorandum Opinion and Order to reflect different calculations are unnecessary.

B. Post-Settlement Attorney's Fees.

The Court's Order of March 10, 1981, omitted any award to Litman, Litman, Harris & Specter for work necessarily performed subsequent to October 24, 1980, the latest date for inclusion in the October 28, 1980 Supplement. Furthermore, no consideration was given to work to be performed in implementing the affirmative relief provided in the Stipulation, e.g., selecting the independent consultant to validate the job requirements for union positions. Since any waiver of further supplementation was obviously predicated upon the anticipated award of a multiplier, the Court will permit supplementation to show work done since October 24, 1980. It further appears that denial of an award for future work would be penny wise but pound foolish for the class. The validation process is the heart of the affirmative relief conceded by defendant Bell, and joint selection of the consultant is the major practical device for assuring confidence in the results. REquiring class counsel to perform these functions wholly without compensation would jeopardize enforcement of one of the most valuable provisions of the settlement.

The Court accordingly AMENDS the fee award to Litman, Litman, Harris & Specter, previously set forth in Attachment A of the March 10, 1981, Order, to add the following:

1. Fees and expenses incurred by Litman, Litman, Harris & Specter from October 24, 1980, to the date of this amendment, as detailed in the affidavit filed on March 26, 1981; and

2. Allowance for 50 hours of attorney's time at $125/hour plus $1,500 for expenses to be incurred in overseeing implementation of the affirmative relief provided in the Stipulation.

The amended fee award to lead counsel's firm and amended totals are summarized in an attachment to this Order.

C. Interest.

The Court remains convinced that the statutory pre-judgment interest ordinarily payable on liquidated amounts is inappropriate for an award of attorney's fees. As pointed out in the Memorandum Opinion and Order, there is even some question as to whether awards of post-judgment interest on attorney's fee will ultimately be permitted in this Circuit. *Carpa, Inc. v. Ward Food, Inc.*, 567 F.2d 1316, 1321-1323 (5th Cir. 1978); *Gates v. Collier*, 616 F.2d 1268, 1280 (5th Cir. 1980) *per curiam on petition for rehearing* 636 F.2d 943 (1981). However, the Court is persuaded that a *pro rata* sharing in interest accrued on a settlement fund that was obtained through the efforts of counsel is a reasonable and equitable method of allocating benefits between the client class and its attorneys, fully consistent with *Johnson* criteria.

Defendant has informed the Court that, assuming cancellation of the six month certificate of deposit on the date of maturity, the settlement fund plus interest accrued as of October 24, 1980, equalled $1,351,811.54. It is accordingly ORDERED that a pro rata portion of the interest accrued on the settlement fund of $1,351,811.54 from October 24, 1980, until the date of actual distribution of attorney's fee awards shall be awarded to plaintiffs' respective counsel according to the following formula:

$$\text{Interest since October 24, 1980} \times \frac{\text{Attorney's Fee Award From Attachment A, As Amended}}{\$1,351,811.54^{*}}$$

*Defendant may correct for deduction of any penalties incurred for premature withdrawal of funds.

The remaining interest shall be distributed to class members in accordance with the Stipulation.

All other amendments are specifically DENIED. Judgment shall be entered accordingly.

Signed this 10th day of April, 1981.

ELDON B. MAHON

UNITED STATES DISTRICT JUDGE

LITMAN, LITMAN, HARRIS & SPECTER

Attorneys	# Hours	Rate	Fees	
H. Specter	1,581.1	$125/hr.	$197,637.50	
M. Buchwach	817.5	75/hr.	61,312.50	
B. Troiano	92.1	50/hr.	4,605.00	
D. MacCallum	98.4	40/hr.	3,936.00	
				$267,491.00
Paralegal				
E. Blatter	1,294.6	20/hr.	25,892.00	
				25,892.00
			Time	$293,383.00
			Expenses	138,865.78
			Total Fee	$432,248.78

Total Time	$361,286.50	(27% of fund)
Total Expenses	161,704.37	
Total Fee	$522,990.87	(38.7% of fund)

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that true and correct copies of the foregoing Writ of Certiorari have been served upon all counsel of record, by forwarding same by United States mail, first class, postage prepaid, this the 18th day of May, 1982, addressed to:

Stephen N. Shulman, Esquire
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Howard A. Specter, Esquire
1000 Fulton Bldg.
Pittsburgh, PA 15222

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Fort Worth, Texas 76118

Beale Dean, Esquire
203 Fort Worth Club Building
Fort Worth, Texas 76102

CHARLES PADORR

Office - Supreme Court, U.S.
FILED
JUN 24 [illegible]
[illegible] STEVAS,
CLERK

No. 81-2138

In the Supreme Court of the United States

October Term, 1981

SARAH LINDA PARKER, et al.,
Petitioners,

v.

JUDITH K. ANDERSON, et al.,
Respondents

BRIEF OF RESPONDENT-PLAINTIFFS, JUDITH K. ANDERSON AND THE CLASS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HOWARD A. SPECTER, Esquire
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Pittsburgh, Pennsylvania 15219
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Counsel of Record for Respondents Judith K. Anderson and the Class

MICHAEL D. BUCHWACH, Esquire
SPECTER & BUCHWACH
Pittsburgh, Pennsylvania 15219

Additional Counsel for Respondents Judith K. Anderson and the Class

Financial Press Corporation, Pittsburgh

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the court of appeals properly affirm the trial court's exercise of discretion in approving a proposed class action settlement under the terms of which the trial court was obliged to, and did, make independent, objective awards of attorneys' fees which Petitioners never challenged as unreasonable in amount?

2. Did the court of appeals properly affirm the district court's exercise of discretion in approving as fair, reasonable and adequate a class action settlement which these Petitioners had authorized their attorneys to accept and which provides a $1,600,000 monetary benefit and substantial affirmative relief, after an adversary hearing at which the objectors to the settlement presented neither credible evidence nor legal authority concerning the strengths and weaknesses of the case or the possible range of recovery, and where the court determined that there was only a marginal chance of a $5,000,000 recovery if plaintiffs prevailed?

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No. 81-2138

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BRIEF OF RESPONDENT-PLAINTIFFS, JUDITH K. ANDERSON AND THE CLASS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTRODUCTION

The trial court found that Petitioners authorized their attorneys to approve a proposed class action settlement if their individual exorbitant demands were also met and that they opposed the settlement in bad faith only after those demands were not met (B-21, 22).[1] After conducting an adversary hearing at which the Petitioners, who had more than four months to conduct discovery in support of their objections, presented

[1] "A- , B- and C- " references are to the designated page(s) of the Appendices to the Petition for Writ of Certiorari. "Tr. " references are to the designated page(s) of the transcript of the Settlement Hearing conducted on October 16, 17 and 18, 1980.

neither credible evidence nor legal authority concerning the strengths and weaknesses of the case or the possible range of recovery, the court found to be fair, reasonable and adequate a class action settlement which then provided a $1,370,000[2] monetary benefit and substantial affirmative relief which was estimated to cost the defendant employer $1,000,000 (B-14, 27). In contrast to this substantial benefit to the class, the court found that there was only a marginal chance of a $5,000,000 recovery if plaintiffs prevailed (B-20). The court found further that the settlement negotiations were at arm's-length between mature attorneys of the highest ethical caliber and that counsel behaved appropriately during and subsequent to the settlement negotiations (B-20, 30, 31, 32). Each of these findings was upheld by the court of appeals (A-8, 9, 11, 12, 13, 14, 16, 17).

Now, in an effort to persuade this Court to hear this case, Petitioners disregard virtually all of the trial court's findings, as affirmed by the court of appeals, misstate the facts, insult the trial court and defame the class attorneys. Incredibly, their Petition lacks even a single reference to the appended opinions of either court. Perhaps even more unjustifiable is the Petitioners' absence of candor concerning the facts. Rather than stating the facts found by the lower courts or attempting to demonstrate that the factual findings are erroneous, Petitioners pretend that their alleged version of events is the uncontroverted truth. The Court will recognize gross distortions at once upon reading the opinions of the respected district and circuit judges. Accordingly, it is unnecessary to respond to each of Petitioners' baseless factual misstatements.

It is impossible to accept the Petitioners' arguments without rejecting the entire record and the findings below. Furthermore, Petitioners' erroneous factual statements insinuate their

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[2]Pursuant to the terms of the settlement agreement, the defendant deposited $1,250,000 at interest for the benefit of the class in March, 1980. The settlement funds now approximate $1,600,000.

legal arguments and, consequently, render inapposite the few decisions upon which they rely. As no factual or legal basis exists for this Court's granting the requested writ, the Petition should be denied.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Raise The Questions Presented By Petitioners Since Those Questions Are Premised Upon Unsupported Factual Allegations Which Have Been Rejected By The Lower Courts.

Petitioners' misperception of the appellate process has resulted in their making the same mistake before this Court that they did before the court of appeals. On appeal, they ignored the "clearly erroneous" rule and disregarded the trial court's findings. They continue to assert baseless factual contentions even though a unanimous court of appeals affirmed contrary findings on each of Petitioners' allegations. Those findings, once affirmed by the court of appeals, are not properly reviewable on a petition for writ of certiorari. *Rudolph v. United States*, 370 U.S. 269 (1962) (*per curiam*); *Comstock v. Group of Institutional Investors*, 335 U.S. 211 (1948); *Allen v. Trust Company*, 326 U.S. 630 (1946).

In a thinly-veiled effort to appeal to the adequacy of counsel issue which has been identified with the Chief Justice of the United States, Petitioners base their pleas on untrue allegations of wrongdoing by lead counsel. After a full and fair hearing, the trial court rejected each of Petitioners' contentions. Judge Mahon concluded that, "Negotiations were at arm's-length between mature attorneys of the highest ethical caliber . . ." and that there was "simply no rebuttal evidence of any weight to suggest that either attorney agreed to a settlement figure or settlement terms that were at variance with his *bona fide* professional judgment as to the strengths and weaknesses of his case, the expense of trial, and the likelihood of

protracted appeals" (B-20, ¶9). The district judge also found that "counsel consulted regularly and frequently with the class representatives throughout the case" and that the tentative settlement proposal was circulated for discussion with the named plaintiffs before the Stipulation of Compromise and Settlement was executed on March 28, 1980 and submitted to the court on April 18, 1980 (B-21, 22).[3]

Perhaps most significantly, the court also found that "all named plaintiffs consulted their attorneys about the class settlement and authorized them to convey binding settlement offers to defendant Bell and to approve the class settlement on their behalf if accepted" (B-21, ¶14). After a thorough review of the record, the court concluded that "lead counsel behaved appropriately in negotiating the tentative settlement as spokesman for the class, immediately advising the named plaintiffs and associate counsel of its terms by letter, and ascertaining the named plaintiffs' reaction to the settlement before presenting it to the Court by their Joint Motion for Preliminary Approval on April 18, 1980" (B-31-32, ¶11). Thereafter, the court of appeals considered these findings and stated, "We perceive no error in these findings" (A-13).

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[3]These findings, which contradict Petitioners' contention that they were unaware of the terms of the proposed settlement before agreement was reached, are supported by the record. The very day after lead counsel and Bell's counsel signed the February 29 letter which confirmed their mutual understanding of a tentative settlement proposal, Mr. Specter met with his clients and discussed the negotiations (Tr. 169, 276). Moreover, it was not Mr. Specter's function to meet with individual plaintiffs who were represented by other counsel. Accordingly, Mr. Mitchell, who represented most of the plaintiffs, contacted some of them to inform them of the tentative agreement on February 29 (Tr. 96, 114). He met with one of his clients on March 1 and showed her the letter which had been signed by lead counsel and Bell's counsel (Tr. 362). On March 9, Mr. Mitchell met with six of his clients and gave them each a copy of the February 29 letter (Tr. 94-95, 114-15). Petitioner Spears, who was represented by another lawyer, was informed of the status of the negotiations on March 3, 1980 (Tr. 315).

The court of appeals specifically addressed counsel's representation of the class also. The court considered Petitioners' contentions and held that, "The record does not support any of these assertions" (A-9). With respect to the contention that counsel did not consult with Petitioners in a meaningful way and that counsel failed to disclose some matters and misrepresented others, the court held that, "These allegations are contrary to factual findings by the trial judge and are not supported by the record" (A-12). The court reached similar conclusions with respect to Petitioners' contentions concerning disclosure (A-13) and alleged misrepresentation (A-13-14). Petitioners cannot rely upon contrary assertions as if this Court had no record before it.

Petitioners' contentions in their Statement of Facts are no more than figments of their imaginations and wishful thoughts. Just a few illustrations of the liberties which Petitioners have taken with the record and the findings below demonstrate the impossibility of relying upon their contentions in determining whether to grant a writ of certiorari. Petitioners respond to the court of appeals' statement that lead counsel gave "uncontroverted testimony" by arguing to this Court that, "Mr. Specter did not testify, nor was he sworn to testify, at the settlement hearing about anything except attorney's fees" (Petition, p. 18). What they fail to reveal to this Court, however, is the fact that their own counsel agreed at the Settlement Hearing that the entire pretrial record, including the deposition of Mr. Specter, was properly before the court for consideration in connection with the proposed settlement (Tr. 314).

Similarly, Petitioners cavalierly state that on April 18, 1980, "Mr. Specter also misrepresented to the district court that all of the representatives approved the agreement, despite Mr. Specter's obvious knowledge of their strong opposition just ten days before" (Petition, p. 6). In this unwarranted attack

upon counsel, they fail to acknowledge that the court of appeals specifically affirmed the trial court's conclusion that, "It would be a gross distortion of the events to suggest that counsel attempted to conceal or even delayed notifying the Court of the Plaintiff-Objectors' dissent once it became irreconcilable" (B-32). The court of appeals properly recognized that, "Obviously, the trial judge is in the best position to know whether he was or was not informed of the opposition" (A-13). In connection with this argument, one can only wonder why the Petitioners have not disclosed to this Court the fact that shortly after the March 26, 1980 meeting they converged *en masse* upon Judge Mahon and his staff to voice their objections personally, a fact which was brought home promptly to everyone involved in this case.

In another distortion of the record, Petitioners assert that it was not until after Mr. Specter had formally signed and approved the proposed settlement that the Petitioners learned "for the first time" that he had negotiated matters involving attorney's fees (Petition, p. 6). Here, they ignore not only the findings that there was no impropriety in any of counsel's conduct, but also their own sworn affidavits that at least six of them received a copy of the February 29 letter, the document which contained the fee language which they now question, on March 9, 1980, 19 days before the Stipulation of Compromise and Settlement was signed. See footnote 3, *supra*.

It is glaringly apparent that this Court cannot properly unravel Petitioners' factual misstatements as a basis for granting a writ of certiorari.

II. Not Only Is There No Conflict Among The Decisions Of The Courts Of Appeals Concerning The Propriety Of A Proposed Class Action Settlement Under The Terms Of Which The Trial Court Is Obliged To, And Does, Make Independent, Objective Awards of Attorneys' Fees To Be Awarded From A Settlement Fund, But Petitioners Have Misstated The Facts As Found By The Trial Court And Affirmed By The Court Of Appeals In Order To Create The Appearance Of A Conflict.

In order to appreciate the numerous fallacies which underlie Petitioners' argument concerning the propriety of negotiating a class action settlement which provides that the court may award fees from a settlement fund, it is important to recognize precisely what the record establishes was and was not negotiated. Paragraph 10 of the Stipulation of Compromise and Settlement provides that "all Plaintiffs' attorneys' fees, expenses and costs awarded by the Court shall be paid from the Settlement Fund" (A-15) and that Bell Helicopter would "have no further liability as to fees and costs than from the Settlement Fund except with respect to fees earned or costs incurred subsequent to the date of execution of this Stipulation in connection with the claims of the individual Plaintiffs" (A-15). As the trial judge stated and as counsel for Petitioners acknowledged in open court (Tr. 461-63), there was absolutely no negotiation of a single question concerning the amount of, or entitlement to, fees.

The only fee-related subject discussed by the negotiators was that any settlement, in whatever amount, would satisfy Bell Helicopter's liability for the class's claims and for whatever amounts, if any, the court might award to counsel (Specter depo., p. 58).[4] There was no agreement by Bell Helicopter to

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[4]"Specter depo., p. " references are to the designated page(s) of the transcript of deposition of Howard A. Specter taken by Petitioners on October 3, 1980.

pay any fee, to not oppose any fee or, indeed, to do anything else with respect to any possible fee (A-15; Specter depo., p. 58). At the outset of the negotiations, Bell Helicopter wanted and was entitled to know, as both parties had to know, what liabilities would be extinguished by any payment upon which they might agree (Specter depo., p. 57).

Judge Mahon responded to Petitioners' attack regarding this matter. At the Settlement Hearing, he stated:

> I want to make it clear that it is solely on the shoulders of the Court, period. I don't have to approve anybody's fees. The amount is left entirely to the Court. I can grant whatever I determine from the record and from the facts.
>
> What is before the Court at this time is that Bell has offered to settle the class action for X dollars, period, and plus numerous other acts, non-monetary acts that the class action is seeking. As far as whether the settlement is approved is strictly up to the Court, based on the evidence, based on what the Court finds.
>
> As far as what attorney fees will be awarded to any lawyer is solely on the shoulders of the Court, one hundred percent. There is no agreement between the attorneys and the litigants on what their fee is going to be or can be. It is strictly up to the Court. That is what the Supreme Court held. That is a rather awesome responsibility, but the Judge's responsibility in nearly every case is rather awesome and all we can do is follow the law, take the facts and apply the law. And that is what we are supposed to do anyway. If I approve it then I will have to set the fees. If I don't approve it, then of course, you will proceed from that standpoint as to the trial of the case. (Tr. 463-64).

Petitioners' reliance upon *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977), is misplaced. Petitioners assert

that the United States Court of Appeals for the Third Circuit was presented with a situation identical to the one here. In fact, the condemned vice in *Prandini* was the negotiation of a settlement agreement which provided for payment of one sum certain to the class and another, separate, sum certain to counsel. It was undisputed that two separate sums were negotiated simultaneously. The court properly recognized the conflict created by that situation. There, it was clear that in reality there was only one fund for both the class and the attorneys' fees and that class counsel, not the court, had made the allocation between counsel and the class. No such situation exists here, where there were no negotiations concerning entitlement to fees or the amount of any fees and where the district court conducted an open adversary hearing at which it shouldered the sole responsibility for determining fee entitlements.

Equally inapposite is *Mendoza v. United States*, 623 F.2d 1338 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), the only other appellate decision upon which Petitioners rely. *Mendoza*, like *Prandini*, involved class counsel's simultaneous agreement upon one sum for the class and another sum for attorneys' fees. Nevertheless, the appellate court properly recognized that each case must be scrutinized and decided on its own peculiar facts in the exercise of the trial court's informed discretion. The court upheld approval of the settlement and reasoned as follows:

> Whether the existence of this potential conflict requires a trial court to reject a settlement proposal depends upon the circumstances of each case. The presence of simultaneously negotiated attorneys' fees should cause the court to examine with special scrutiny the benefits negotiated for the class. It would rarely be an abuse of discretion for a trial court to reject a settlement proposal where such combined negotiation took place. But rejection of a settlement is not automatically required in such cases—there may be circumstances present which appear to neutralize the potential for impro-

> priety. Such a judgment is appropriately within the sound discretion of the trial judge who can be sensitive to the dynamics of the situation. Thus, while we strongly discourage the simultaneous negotiation of attorneys' fees and substantive issues in class action settlement negotiations, *accord, Prandini*, 557 F.2d at 1021, we do not believe rejection of a resulting settlement in every case is appropriate. *Id.*, 628 F.2d at 1353.

In this case, where there was no simultaneous negotiation of a sum certain of attorneys' fees and where the trial court's findings of proper conduct on counsel's part were upheld by the court of appeals, *Mendoza* adds nothing to Petitioners' attack.

For reasons best known to them, Petitioners failed to cite *Piambino v. Bailey*, 610 F.2d 1306 (5th Cir.), *cert. denied*, 449 U.S. 1011 (1980), the only other appellate court decision to deal with this question. That opinion was called to the attention of Petitioners' counsel by lead counsel during the course of his deposition in this case and was distinguished by the court of appeals (A-16). *Piambino* is particularly relevant since it was decided by the same court of appeals which affirmed the settlement herein. In *Piambino*, the settlement agreement expressly provided for the payment of a specific amount of attorneys' fees out of the settlement fund. As the district court in *Piambino* pointed out in approving the settlement, it was "not being asked to set reasonable attorneys' fees in conjunction with the instant settlement; rather the court is being presented with a proposed settlement, agreed to by all parties and unopposed by the class, which incorporates an award of attorneys' fees in the amount of $750,000.00 as a vital part of the settlement." *Piambino, supra*, 610 F.2d at 1328. On that reasoning, held the court of appeals, "the district court abdicated its responsibility to assess the reasonableness of attorneys' fees proposed under a settlement of a class action, and its approval of the settlement must be reversed on this ground alone." *Id.* In the instant case, there were no such negotiations and the entire subject of attor-

neys' fees was left to the discretion of the court. The trial judge did not abdicate his duties and made it clear that he recognized his grave responsibility. He rubber-stamped none of the fee requests.

Clearly, under the circumstances here, where there was no negotiation of any sum for attorneys' fees, and where the settlement has withstood the test of reasonableness, approval and affirmance of approval of the settlement were appropriate. The district court, who observed counsel throughout the litigation, found that the settlement negotiations had been at "arm's-length between mature attorneys of the highest ethical caliber" and that the "objectors adduced no persuasive evidence to show fraud or collusion or to otherwise impeach [Mr. Specter's] evaluation of the settlement given the weaknesses of the case" (B-20, 30). These findings, which Petitioners disregard completely, were affirmed by the court of appeals (A-8, 12, 13, 16). There simply is no basis to suggest to this Court that a fair and reasonable settlement should be set aside because of theoretical conflicts. *Robertson v. National Basketball Association*, 389 F. Supp. 867, 899 (S.D.N.Y. 1975).

Petitioners have pointed to no case in which a settlement agreement of the kind approved by the district court was held to be improper. Not one of the cases which they cite deals with a situation even remotely similar to the one involved in this case.[5] It is not surprising that they do not in light of the long-standing American rule articulated by this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). This Court recognized there that historically the fees of class action attorneys have been paid out of the fruits of their labors.

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[5]For example, Petitioners place reliance on *Jamison v. Butcher & Sherrerd*, 68 F.R.D. 479 (E.D. Pa. 1975). There, the court refused to approve a settlement under which the class was receiving no consideration and where the defendant had agreed to pay plaintiffs' counsel a fixed sum for attorneys' fees.

In arguing that the denial of certiorari somehow will engender abuse of the class action device, Petitioners misread the opinion of the court of appeals and rely upon ill-founded theoretical arguments. They assert that the court of appeals held that when applicable procedures for determining the reasonableness of attorneys' fees are followed, "any review of matters involving an attorney's conduct is limited to whether the trial court abused its discretion in determining the amount of the fee" (Petition, p. 8). They disregard the fact that the trial court specifically inquired into and made findings concerning counsel's conduct (B-20, 30). They further ignore the fact that the court of appeals reviewed and upheld these findings concerning counsel's conduct (A-11). Review was anything but limited. The detailed review which was conducted by the trial court and affirmed by the court of appeals more than answers Petitioners' concern for a "guarantee that a class attorney has ardently and conscientiously bargained for the most adequate compensation for the class" (Petition, p. 8). The suggestion that "one could never be sure that a class attorney later submitted a modest request for attorney's fees in order to avoid any examination of the earlier manner by which he had negotiated the settlement" (Petition, p. 9) is ludicrous in the context of this case. Petitioners' complaint is to the contrary. They have never suggested that a "modest request" for attorneys' fees was made.

Petitioners not only have failed to demonstrate the existence of any conflict among the decisions of the courts of appeals, they have also failed to cite a single authority which supports their contention. They create the appearance of precedent only by arguing factual contentions which were properly rejected below.

III. The Courts Below Did Not Apply An Improper Legal Standard.

The trial court made the following finding which was upheld by the court of appeals:

> Plaintiff-Objectors opposed the settlement in bad faith, primarily to gain leverage in settling their individual claims against Bell Helicopter at exorbitant figures. Although there were obvious differences of degree among Plaintiff-Objectors, their opposition to the settlement was a product of disappointment and greed, rather than dispassionate evaluation of the settlement against the risks and expense of pressing on with the litigation (B-22).

After attacking the trial court's integrity by asserting that it "chose to impugn the Petitioners' motives" (Petition, p. 21), Petitioners go on to assert that the trial and appellate courts somehow applied an erroneous legal standard in considering this factor at all. Even a cursory reading of the trial and appellate courts' opinions makes it clear that this finding was not the sole, or even a principal, reason for approving the proposed settlement. As the trial court pointed out, "Whatever the motives of the named plaintiff-objectors, their opposition to the settlement created an adversarial setting in which to weigh the legitimate interest of the objecting class. The objecting class was represented by an able attorney who was afforded the means to raise and adequately develop his position on the adequacy of a settlement negotiated prior to any determination of liability" (B-19, ¶6). If anything, the trial court welcomed the objectors' opposition, without regard to their motives, for that opposition resulted in a thorough record upon which to review the settlement. As the district judge stated, he "had the advantage of an organized and capably represented group of objectors who, if they did not succeed in impugning the settlement, at least left little reason to suspect material gaps in the record" (B-29, ¶7).

The trial court applied the legal standard which has been adopted and utilized by virtually every court which has had occasion to assess the fairness and reasonableness of class action settlements. As the court of appeals recognized, the trial judge articulated and considered the following factors in detail:

(1) whether the settlement was a product of fraud or collusion; (2) the complexity, expense and likely duration of litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles to prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinions of the participants, including class counsel, class representatives, and the absent class members (A-6, B-30).[6] These were proper standards to apply. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1214-19 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *Shlensky v. Dorsey*, 574 F.2d 131 (3d Cir. 1978); *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

The settlement was approved in light of the overwhelming evidence concerning its fairness and adequacy.[7] Because there

[6]The trial court considered seriously the fact that it received 242 objections, representing approximately 20% of that segment of the employee class still working at Respondent Bell's Fort Worth facilities on March 1, 1980. Petitioners place heavy reliance upon this factor, but fail to reveal that all but 12 of these objections, including those of former employees, were in the form of preprinted petitions which were circulated by Petitioners personally (B-23). They also fail to point out that only one class member from Amarillo and none of the 1,380 unhired applicants who filed claims filed objections. Only persons to whom Petitioners directed a misleading campaign against the settlement filed objections (*Id.*). The objections must be read in this context and were so treated by the trial court.

[7]The Petitioners were unable to adduce any facts in support of their broad-ranging charge that the class action settlement was insufficient. As the court of appeals indicated, Petitioners "offered no evidence at the settlement hearing" concerning the issues of probability of success or the range of recovery (A-8). Thus, Petitioners ignored the many risks faced by the plaintiff class, including the risk of eventual decertification of a class which included unhired applicants, employees, union and non-union personnel and personnel from Bell's facilities both in Fort Worth and in Amarillo. This Court's recent decision in *General Telephone Co. v. Falcon*, 50 U.S.L.W. 4638 (U.S. 1982), is clear evidence of the reality of the risks inherent in continuing this case through trial and appeal. Petitioners continue to ignore these and other substantial impediments to recovery.

were serious credibility issues to be resolved arising from Petitioners' unproven allegations concerning counsel, including the question of whether the Petitioners earlier had given their approval to the settlement, it was appropriate for the trial court to assess the Petitioners' motives in evaluating their credibility. Even if the Petitioners' motives, standing alone, could not be a basis for approving or disapproving the settlement, their motives impact heavily upon such questions as whether they had authorized their attorneys to accept the proposed settlement if their individual demands were met; whether they accurately portrayed their communications with counsel; whether they sought information concerning the settlement, as they contend, or whether they rejected such information when it was offered; and, indeed, whether their own representation of the class was fair and adequate. The trial court had the heavy responsibility of considering and resolving issues such as these. Based on the clear record, it resolved them against the Petitioners. That is their sole complaint.[8] That complaint does not merit this Court's exercising its discretionary power in this lawsuit. There is nothing important, novel or extraordinary in a party's complaining that the fact-finder disbelieved it.

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[8]Petitioners also contend that the court erroneously concluded that they were attempting to exercise leverage in opposing the settlement because, they say, they had no leverage to exercise. The record evidence is to the contrary, however. As all persons involved understood, the proposed settlement could not be finalized until it was adopted by the parties. Petitioner Jackson testified at the Settlement Hearing that it was her understanding that the class action could not be settled unless the individual claims were also settled (Tr. 7). Petitioner Haynes expressed the same belief (Tr. 241-42). Lead counsel similarly expressed his understanding in the letter introduced as Objectors' Ex. 2 at the Settlement Hearing. He stated therein: "Bell has offered to settle your individual claim for the sum of $1,500 *contingent upon adoption of the class settlement agreement by the parties* and approval of that settlement by the court." (Emphasis supplied.) It is apparent, therefore, that Petitioners believed they had substantial leverage.

CONCLUSION

Confronted with what the settlement proponents demonstrated and what the district court and court of appeals found to be a fair, reasonable and adequate settlement, the Petitioners make a vicious and unwarranted attack on the distinguished district court judge and on class counsel. As demonstrated by the lower courts and this brief, Petitioners premise their insulting arguments on matters which they never proved and which, in fact, were rejected as unsupported by the evidence. Petitioners' greed and bad faith opposition to a settlement which will benefit thousands of people should not be rewarded by this tribunal. The Petition should be denied so that the class members now will be able to avail themselves of the hard-fought relief to which they are entitled.

Respectfully submitted,

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No. 81-2138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SARAH LINDA PARKER, *et al.*,
Petitioners,

vs.

JUDITH K. ANDERSON, and
BELL HELICOPTER COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF BELL HELICOPTER TEXTRON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May counsel representing a plaintiff class agree to a settlement which provides for a fixed sum of money to cover both back pay for the class and attorney's fees where the settlement agreement fixes the formula by which the money is to be distributed to individual class members and provides that the amount of fees, if any, to be subtracted from the settlement fund is to be determined exclusively by the Court?

2. May experienced counsel appointed by the Court to represent absent class members conclude a settlement of the absent class members' claims without the consent of all the named plaintiffs, whose claims were not included in the settlement?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF BELL HELICOPTER TEXTRON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

These consolidated cases involve allegations that defendant Bell Helicopter Textron ("Bell") discriminated against blacks on the basis of race and against women on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* The first of the consolidated complaints was filed on March 5, 1975, and a plaintiff class was certified on April 21, 1978. On April 18, 1980, a proposed settlement of all class claims and motion for approval was submitted to the District Court, the Honorable Eldon B.

Mahon, Judge. The District Court held an evidentiary hearing on October 16-18, 1981. The Court issued a memorandum opinion and order approving the settlement on March 10, 1981. On April 10, 1981, the District Court ordered the entry of a final judgment on the class claims. This order was affirmed by the United States Court of Appeals for the Fifth Circuit on February 18, 1982.

This litigation began in earnest on April 19, 1977, when the District Court conditionally consolidated and certified a class in five pending Title VII actions against Bell.[1] The consolidation order set the procedural ground rules under which the cases moved toward final class certification[2] and trial. One of the more significant procedural provisions was the appointment of Howard A. Specter as lead counsel for the class. The District Court endowed upon Mr. Specter "primary responsibility" for directing the plaintiffs' case. The Court expressly made Mr. Specter responsible "for providing fair representation to all members of the conditionally certified and consolidated class." Order of April 19, 1977, *Parker v. Bell Helicopter Co.*, Civil Action No. 4-75-61-E (N.D. Tex.) (Conditionally Consolidated).

After more than two years of extensive discovery and several unsuccessful attempts by Bell to exclude from the class applicants, nonunion employees, and employees at its Amarillo facility, a trial on all issues of class liability was scheduled to commence on Monday, March 3, 1980. On February 6, 1980, the parties gathered in Judge Mahon's courtroom for a pretrial conference. No one had reason to expect, at that time, that the case would settle. Several earlier settlement discussions had died at an early stage, and the parties had virtually completed their trial preparation. A trial consuming approximately 20 business days was predicted.

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[1] One of the consolidated cases, *EEOC v. Bell Helicopter Co.*, Civil Action No. CA 4-75-249, was subsequently dismissed. Complaints by Judith Anderson and Nathaniel Rodgers were consolidated with the four remaining actions on October 11, 1978 and October 18, 1978.

[2] The conditional certification of April 17, 1977 was solely for purposes of discovery prior to a full hearing on class certification.

At the February 6 conference, Judge Mahon expressly counselled the parties, in strong language, to attempt to reach a settlement. In deference to this request, the parties met later that evening. As often occurs when a major trial looms large on the horizon, these discussions bore fruit. On Friday, February 29, 1980, Mr. Specter, on behalf of the class, and Stephen N. Shulman, on behalf of Bell, signed a letter setting forth the outline of a mutually acceptable consent decree. For the first time, likely settlement of the case became a reality.

The February 29 letter agreement included, at Bell's insistence, a provision that final settlement of the class claims be contingent, at Bell's option, upon settlement of the claims of each of the eleven named plaintiffs. Bell pursued this all or nothing approach to effect an important consideration in any settlement — putting an end to the entire litigation. This contingency, however, granted to the named plaintiffs a perceived veto power over the total settlement which produced highly inflated individual demands on their part.[3] When it became apparent that the plaintiffs were attempting to use their individual claims in that fashion, Bell reassessed its position. It decided that settlement as to the class only would be advisable despite a continuation of the individual claims.

On April 21, 1980, a proposed consent decree and motion for approval were filed with the District Court. The decree, which provided that Bell denied all liability and wrongdoing whatsoever, proposed that the proceeds of a $1,250,000 certificate of deposit purchased by Bell on March 3, 1980 be distributed to the class, in accordance with a prescribed formula, and to plaintiffs' counsel, in an amount to be determined by the Court. In addition, Bell agreed to several affirmative undertakings valued at approximately $1,000,000.

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[3] For example, Mr. Mackey demanded $100,000, Mr. Odom $84,000, Ms. Parker $70,000, Ms. Jackson $50,000, and Ms. Haynes $50,000. In addition, these same plaintiffs requested promotions and pension plan adjustments. Mr. Mackey and Mr. Odom also jointly requested that they receive a $56,660 award of attorney's fees and costs from the settlement fund to compensate them for services they provided to the class.

Upon becoming aware that most of the named plaintiffs wished to oppose the settlement of the class claims, the District Court appointed Charles Padorr to represent dissenting class members. After distributing notice to the class and providing Mr. Padorr several continuances to conduct discovery and to review the record, the District Court scheduled a hearing on the settlement proposal for October 16, 1980. The Court ordered Bell to analyze the responses to the notice and report the precise magnitude of the objections to the settlement and of claims on the settlement fund prior to the hearing.

Among the witnesses at the settlement hearing was Dr. Charles Mann, the plaintiffs' expert statistician. Dr. Mann had, in preparation for trial, examined and manipulated the data in Bell's computerized personnel files. The unedited computer tapes containing this data had been turned over to plaintiffs' counsel during discovery. Dr. Mann stated that, in light of this data, the plaintiffs' case was "not particularly strong." (App. B-19).

The objectors did not come forward with any evidence suggesting that Dr. Mann's analysis was overly pessimistic. Indeed, Mr. Padorr rejected Mr. Specter's invitation to examine the plaintiffs' evidence.

After full briefing, both before and after the hearing, and three days of live testimony, the District Court found the settlement to be fair, reasonable, and adequate. The Court generally discounted the named plaintiffs' objections, finding, after carefully observing them testify, that the plaintiffs held their own interests paramount to those of the class. The Court stated as a finding of fact,

> Plaintiff-objectors opposed the settlement in bad faith, primarily to gain leverage in settling their individual claims against Bell at exorbitant figures. Although there were obvious difference [sic] of degree among the plaintiff-objectors, their opposition to the settlement was a product of disappointment and greed rather than a dispassionate evaluation of the settlement against the risks and expense of pressing on with the litigation. (App. B-22).

REASONS FOR DENYING THE PETITION

I. There Is No Conflict In The Courts Of Appeals Concerning Attorney's Fees.

Petitioners' contention that Mr. Specter improperly negotiated his fee as part of the settlement is without substance. *See* Petition for Writ of Certiorari, 7-12. The simple fact is that Mr. Specter did not negotiate a fee at all. The amount of Mr. Specter's and associate class counsels' fee was left entirely to the discretion of the District Court.

The Court of Appeals did not, as Petitioners now assert, rule that the amount of a fee award is the sole measure of its reasonableness. *See* Petition for Writ of Certiorari, 8. Quite to the contrary, the Court of Appeals required that the adequacy of the entire settlement be evaluated with sensitivity toward the potential for counsel to trade off class relief in exchange for a fee and stressed that, in this case, the District Court had complete control over the fee awarded. (App. A-16).

The cases relied on by petitioners do not suggest a different rule. *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977), and *Mendoza v. United States*, 623 F.2d 1338 (9th Cir.1980), *cert. denied*, 450 U.S. 912 (1981), both involve a fixed agreement by the parties as to the division of the settlement fund between back pay and attorney's fees. Such agreements raise the prospect that the defendant could substantially decrease its payment to the class by offering plaintiffs' counsel a sizeable fee. Here, where no portion of the fund was specifically earmarked for attorney's fees, that phenomenon could not occur.

An immutable requirement that attorney's fees not be addressed until after approval of a back pay settlement would also represent bad policy. It is extremely difficult for a defendant to agree to a back pay settlement when its obligation for attorney's fees remains open. The very purpose of a settlement is to liquidate the potential liability associated with a lawsuit. The procedure used to settle this case should, if anything, be encouraged.

II. Negotiation Of A Fair, Adequate, And Reasonable Class Settlement By Class Counsel Constitutes Adequate Representation.

There can be no doubt that Mr. Specter was to negotiate a settlement of the class claims. Such conduct was fully consistent with Mr. Specter's mandate as lead counsel and with the Court's express instructions at the pretrial conference. Indeed, it is difficult to conceive how Bell could have refused to conduct negotiations with Mr. Specter. By the same token, Mr. Specter was empowered to agree to a settlement, once negotiated, on behalf of the absent members.

Petitioners' entire argument is based on the mainfestly incorrect premise that their position as class representatives permitted them to control the course and outcome of settlement negotiations. *See* Petition for Writ of Certiorari, 12-23. The proposition that class representatives may veto a settlement has been rejected by every Court of Appeals to consider the issue. *See, Kincade v. General Tire and Rubber Co.*, 635 F.2d 501, 508 (5th Cir. 1981); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *Flinn v. Fmc Corp.*, 528 F.2d 1169, 1174 n.19 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); *Saylor v. Lindsley*, 456 F.2d 896 (2d Cir. 1972). As stated by the Court of Appeals for the Second Circuit, "[T]he assent of the plaintiff (or plaintiffs) who brought a derivative stockholder's action is not essential to a settlement; a contrary view would put too much power in a wishful thinker or a spite monger to thwart a result that is in the best interests of the corporation and its stockholders." 456 F.2d at 889-900.

In this case, the settlement does not even include the individual claims of the named plaintiffs. If class counsel has the authority to settle all class claims, including those of the representatives, over the representatives' objections, surely Mr. Specter acted properly in severing the named plaintiffs' claims and reaching a settlement for the absent class members alone. Whatever rights the named plaintiffs had to be informed of and to comment on the settlement were more than satisfied by their involvement in the process after completion of the February 29

letter agreement and by the formal settlement approval process, which afforded the named plaintiffs full discovery rights and a hearing.

The ultimate measure of the adequacy of class counsel's representation is the adequacy of the settlement itself. And the single most important indicium of adequacy is the likelihood that plaintiffs could have achieved significantly better results by going to trial. *See Armstrong v. Board of School Directors of City of Milwaukee,* 616 F.2d 305, 314 (7th Cir. 1980); *Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir. 1977). Not only did the District Court, in accordance with the testimony of plaintiffs' expert, conclude that the likelihood of a better result was slight, but the named plaintiffs made no effort whatsoever to demonstrate any strengths in the class case. For all the named plaintiffs' complaints about the quantity and quality of the statistical data class counsel provided to them during the settlement negotiations, neither the named plaintiffs nor Mr. Padorr ever set foot in Mr. Specter's office to examine the evidence.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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